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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, the Supreme Court of New Jersey held that a "pollution exclusion" clause, widely utilized in insurance contracts and expressly approved by the New Jersey Department of Insurance in 1971, has the "plain meaning" asserted by petitioners. The state supreme court, however, proceeded *sua sponte* to invoke principles of equitable estoppel and, without notice, hearing, or a relevant evidentiary record, estopped the "insurance industry" from enforcing the plain meaning of the regulator-approved exclusion in New Jersey due to supposed (but non-existent) misrepresentations made to state regulators in 1970. This estoppel has a potential financial impact of billions of dollars on an industry-wide basis.

In view of the foregoing, the questions presented are:

(1) Is the Due Process Clause of the Fourteenth Amendment violated when a state supreme court *sua sponte* invokes the doctrine of equitable estoppel to impose retroactive liabilities without allowing an evidentiary hearing on any of the disputed factual issues dispositive under the state's own estoppel principles?

(2) Is the decision below in conflict with the express holdings of this Court under the Due Process Clause in *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937) (Cardozo, J.), and *Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.)?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of New Jersey were Morton International, Inc. (as plaintiff-appellant); General Accident Insurance Company of America, Affiliated FM Insurance Company, Continental Casualty Company, and First State Insurance Company (as defendants-respondents); and Liberty Mutual Insurance Company, American Home Assurance Company, Insurance Company of North America, Underwriters at Lloyd's London, and Certain Subscribing London Market Insurance Companies (as defendants-respondents and cross-appellants). (*See* Appendix 1a.)

Petitioners before this Court are Insurance Company of North America, American Home Assurance Company, Continental Casualty Company, First State Insurance Company, General Accident Insurance Company of America, and Liberty Mutual Insurance Company. The Rule 29.1 list of their parent companies and subsidiaries (other than wholly-owned subsidiaries) was filed with the Court on March 29, 1994 and is reproduced at Appendix 264a.

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PETITION FOR A WRIT OF CERTIORARI

The Insurance Company of North America, American Home Assurance Company, Continental Casualty Company, First State Insurance Company, General Accident Insurance Company of America, and Liberty Mutual Insurance Company (collectively "petitioners") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinions of the supreme court (App. 1a) and appellate division (App. 114a) are reported at 134 N.J. 1, 629 A.2d 831 and 266 N.J. Super. 300, 629 A.2d 895, respectively. The unreported opinion of the trial court appears at App. 168a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1988). The decision below was rendered July 21, 1993; timely petitions for reconsideration were denied on January 11, 1994. (App. 198a-201a.) On March 30, 1994, Justice Souter extended petitioners' time to file this petition until May 13, 1994. (App. 204a-05a.)

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, U.S. Constitution, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The decision below raises important questions under the Due Process Clause and this Court's holdings in *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937) (Cardozo, J.), and *Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.). Contrary to those holdings, the New Jersey supreme court invoked *sua sponte* a legal theory (equitable estoppel) not alleged or pursued at any stage of the case,

expressly refused petitioners' request for a remand to allow development of an evidentiary record on disputed factual issues, and instead made *de novo* factual determinations by reference to tangentially related case reports, journal articles, and other non-evidential material. The result of this fundamentally flawed procedure was a holding that insurers are equitably estopped from enforcing what the supreme court conceded to be the "plain meaning" of a policy provision approved years earlier by New Jersey's insurance department and other insurance regulators throughout the country. (App. 86a; *see* App. 83a-95a.)

The provision in question, widely known as the "*pollution-exclusion clause*," appears in the great majority of comprehensive general liability ("CGL") policies issued to businesses and local governments throughout the United States from 1970 to approximately 1985. The clause provides:

> This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

(App. 33a.)

This clause has been and will continue to be the focus of numerous lawsuits in state and federal courts. (*See* App. 52a-83a.) After approval of the clause, there was an explosive growth in stringent environmental legislation and regulation, at both local and national levels.[1] In particular,

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[1] *See* Frank B. Friedman, *Practical Guide to Environmental Management* 11-20 (1993) (noting the expansion of federal environmental statutes and regulation during the 1970s); Frank F. Skillern, *Environmental Protection: The Legal Framework* 2 (1981) (describing the 1970s as the "environment decade").

statutes such as the 1980 Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (1988 & Supp. IV 1992), and its state counterparts typically impose "liability . . . retroactively and without regard to fault" on those involved "directly or indirectly" in hazardous waste disposal. (App. 94a.) The court below noted that "[e]stimated remediation costs [under such statutes] range from 150 to 750 billion dollars" nationwide. (App. 94a.)[2] As a result, numerous polluting entities have sought coverage for environmental liabilities notwithstanding the presence of the pollution-exclusion clause in their policies. There are hundreds of state and federal cases pending throughout the country in which the meaning and enforceability of the clause are in question.

A. CGL Policies.

CGL policies originally provided liability coverage only for bodily injury and property damage "caused by accident."[3] In 1966, the "accident"-based type of CGL policy was replaced by a new type covering liability for damage "resulting from an occurrence," and the term "occurrence" was defined to include "exposure to conditions." (App. 36a-39a.) Under the post-1966 "occurrence"-based policy, CGL coverage could be available when liability for property damage was caused by *gradual* processes, but only if the damage was "neither expected nor intended from the standpoint of the insured."[4]

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[2] Of the sites on the National Priority List for clean-up under CERCLA, 108 are located in New Jersey; this represents almost 10 percent of the total and is more than in any other state. *See* National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 8724, 8736-38 (1994) (to be codified at 40 C.F.R. Part 300); John H. Snyder & W. Dolson Smith, *Environmental/Asbestos Liability Exposures: A P/C Industry Black Hole*, BestWeek Property/Casualty Supplement 3 (Mar. 28, 1994).

[3] This discussion focuses on typical CGL policies; many domestic and foreign insurers also issued policies having widely varying provisions.

[4] The 1966 version of the typical policy defined "occurrence" as "an

In 1970, insurers belonging to the then Insurance Rating Board ("IRB") and Mutual Insurance Rating Bureau ("MIRB"), membership service organizations representing a substantial portion of the industry, developed the pollution-exclusion clause expressly to exclude CGL coverage for certain *pollution risks*. (App. 39a-41a.) As held by the Supreme Court of New Jersey below, the "plain meaning" of the IRB/MIRB pollution-exclusion clause differs from the definition of "occurrence" in two respects. (App. 86a; *see* App. 34a-35a.) First, the exclusion focuses on the circumstances of the polluting *discharge*, not (as under the definition of "occurrence") the *damage* caused by the pollution. Second, the exclusion bars coverage for pollution damage unless the discharge in question is "*sudden and accidental*," whether or not the resulting damage is "*expected or intended*" (the inquiry under the definition of "occurrence"). Therefore, under the pollution-exclusion clause, there is no coverage for pollution-damage liability in the absence of an abrupt and accidental discharge. (App. 34a-35a.)

IRB/MIRB representatives filed the proposed pollution-exclusion clause with state regulatory authorities throughout the country in 1970. The provision was approved for use in 47 states (including New Jersey), the District of Columbia, and Puerto Rico. The clause was later adopted by many non-IRB/MIRB companies as well.

B. The Suit Below.

In 1983, a predecessor of respondent Morton International, Inc. ("Morton") was held liable for the severe mercury pollution of Berry's Creek in the Meadowlands. Morton then commenced this action against a number of insurers, seeking declarations that the insurers were obliged to cover that liability under various primary and

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accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" In 1973, "occurrence" was redefined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" (App. 38a (emphasis added).)

excess CGL policies covering the period 1961 to 1976. (App. 5a-8a.)

Many of the policies sued upon included the IRB/MIRB pollution-exclusion clause.[5] Critically, however, Morton never argued in the trial court, the appellate division, or even the supreme court that the insurers should be equitably estopped from enforcing the "plain meaning" of the clause, nor did Morton seek to prove the elements required for an equitable estoppel. Rather, relying on several decisions of inferior New Jersey courts, Morton contended throughout the case that the pollution-exclusion clause is ambiguous and that the clause therefore should be construed to have the same meaning as the policy definition of "occurrence." *See, e.g., Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987.)[6]

Since Morton neither alleged nor sought to prove an equitable estoppel, petitioners had no reason or opportunity to develop an evidentiary record concerning the factual prerequisites that are essential to an estoppel under New Jersey law. There was no discovery on such matters and, since the issue was never raised, neither the trial court nor the appellate division made any findings or conclusions on the elements of an equitable estoppel. (*See* App. 168a; App. 114a.)

On August 27, 1987, the trial court granted summary judgment in favor of the insurers. It held that, without

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[5] Several petitioners here did not utilize the pollution-exclusion clause in the policies sued on below. (App. 8a-14a.) However, those petitioners subsequently adopted the clause and marketed countless policies utilizing it in New Jersey and throughout the country. (App. 43a.)

[6] According to Morton and the cases on which it relied, the word "sudden" in the concluding exception to the pollution-exclusion clause ("this exclusion does not apply if such discharge . . . is sudden and accidental") could mean "unexpected," rather than "abrupt." Hence, Morton asserted, "the crucial question" under the pollution-exclusion clause is the same as that under the definition of "occurrence"—"whether the insured intended or expected the harm for which it seeks coverage." (App. 206a.)

regard to the meaning of the pollution-exclusion clause, Morton's predecessors had "expected and intended" environmental damage and therefore there had been no covered "occurrence." (App. 185a, 189a-90a.) On October 2, 1991, the New Jersey appellate division affirmed, agreeing that there had been no covered "occurrence." (App. 148a-49a.) However, the appellate division also refused to repudiate its earlier position in *Broadwell* that the pollution-exclusion clause is ambiguous and therefore should be given the same meaning as the definition of "occurrence." (App. 153a n.1.)

C. The New Jersey Supreme Court's Decision.

The New Jersey supreme court granted cross-petitions for discretionary review, with Morton challenging the affirmance of summary judgment and petitioners challenging the appellate division's adherence to *Broadwell*. For the first time, Morton was supported by *amicus* briefs, filed by a group of manufacturing interests, by the New Jersey State League of Municipalities, and by the Attorney General of New Jersey.[7]

Neither Morton nor its supporting *amici* argued that IRB/MIRB defendants, much less the "insurance industry," should be equitably estopped from enforcing the pollution-exclusion clause as written if the clause were held to have the "plain meaning" attributed to it by petitioners. Rather, Morton and its *amici* sought to defend the appellate division holding in *Broadwell* that the clause is ambiguous. In that regard, they relied on dictionaries, other insurance usages of the phrase "sudden and accidental," and arguments concerning the 1970 regulatory history

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[7] As noted by the supreme court, "the interests of states in [environmental] insurance-coverage litigation are generally consistent with interests of insureds." (App. 50a.) This is because states are sometime policyholders and are the alternative last recourse for remediation costs. On behalf of the insurers, *amicus* submissions were made by the Insurance Environmental Litigation Association and Aetna Casualty & Surety Co.

drawn from case reports, journal articles, and 1970 regulatory materials not in the trial-court record.

Petitioners responded that the language of the pollution-exclusion clause is unambiguous, and hence that reference to the regulatory history in particular was unnecessary and improper. But they also emphasized repeatedly that the regulatory history involved "hotly contested factual issues" and that, "if the [New Jersey supreme court] believes there should be a resort to regulatory history . . ., [fundamental] fairness dictates that the matter be remanded for an evidentiary hearing [on] a full record." (App. 216a.)[8]

On July 21, 1993, the supreme court issued its lengthy opinion. The court rejected the ambiguity arguments of Morton and its supporting *amici*, holding (as the insurers maintained) that the "plain meaning" of the pollution-exclusion clause bars coverage for pollution damage in the absence of an abrupt and accidental discharge. (App. 34a-35a, 86a.) Accordingly, the court expressly overruled *Broadwell*, the appellate division precedent that Morton and its *amici* had sought to defend. (App. 34a.)

Had the supreme court stopped there, petitioners would have prevailed on the issues they raised. But the court went on to hold, *sua sponte*, that the "insurance industry"

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[8] Noting that *amicus* submissions to the supreme court were no substitute for an evidentiary record, petitioners stressed that "it is fundamentally unfair to let one side put its gloss on a few documents which it has chosen—without allowing the other side an adequate opportunity to challenge that interpretation with its own evidence and, where appropriate, by taking testimony of the authors and recipients. The insurers have not been given that opportunity. This Court is not a trial court, and it should not be lulled into becoming a finder of hotly contested factual issues that were never considered by the trial court." (App. 214a; App. 214a (noting "the dangers of admitting evidence in [an appellate court] where it cannot be challenged").) Elsewhere, petitioners stated that, if the court is "inclined to accept the representations from other cases about what [certain regulatory history] documents showed, we specifically challenge the accuracy and completeness of the 'evidence' and would request a plenary hearing." (App. 208a.)

is equitably estopped from enforcing the "plain meaning" of the IRB/MIRB pollution-exclusion clause in New Jersey except in instances in which "the insured *intentionally* discharge[d] a *known* pollutant." (App. 86a, 93a (emphasis added).) This estoppel was expressly intended to "materially expand" CGL coverage "to a degree that approaches the breadth of ['occurrence'-based] coverage" before New Jersey's 1971 approval of the exclusion. (App. 85a.) By abrogating the literal language of the pollution-exclusion clause, the supreme court put the "insurance industry" at risk for billions of dollars in non-contractual liability.

The supreme court based its equitable-estoppel holding on a New Jersey case never cited or argued by Morton or its supporting *amici—Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969). (*See* App. 88a-90a.)[9] Without any briefing on the question, the supreme court extended *Harr*, which involved a single insurer dealing with an unsophisticated customer, to the very different situation of IRB/MIRB submissions to expert regulators. (App. 90a.) Further, in the absence of any evidentiary record on equitable-estoppel issues, the supreme court drew on case reports, journal articles, and selected fragments of 1970 regulatory history to make summary and *de novo* findings of fact on those issues.

The court ruled (1) that the 1970 IRB/MIRB submissions "to New Jersey and other state regulatory agencies" were "grossly misleading," (2) that those submissions influenced

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[9] In *Harr*, the supreme court established the principle that "where an insurer or its agent misrepresents . . . [insurance coverage to an insured], and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage." 255 A.2d at 219. Having announced that principle, the *Harr* court remanded that case (where $7,500 was at stake) for fact-finding. The equitable-estoppel elements delineated in *Harr* are the same as those recognized in many decisions of this Court. *See Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 494 n.5 (1991) (estoppel elements consist of misrepresentation, reasonable reliance, and detriment); *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (same); *Heckler v. Community Health Servs., Inc.*, 467 U.S. 51, 59 (1984) (same).

New Jersey's "review of the . . . clause," and (3) that "a significant rate reduction" would have been "inescapable" had 1970 regulators understood the clause. (App. 35a, 87a, 90a.) Then, even though IRB and MIRB had submitted the pollution-exclusion clause only on behalf of their 1970 memberships, the court purported to equitably estop the "insurance industry" from enforcing that clause (including companies which only later adopted the IRB/MIRB clause in reliance on the 1970-71 regulatory approvals). (App. 90a.)

The supreme court stated that it would have allowed enforcement of "the pollution-exclusion clause as written" absent grounds for an equitable estoppel. (App. 95a.) Nonetheless, the court expressly refused to remand for consideration of factual issues relevant to an estoppel theory, asserting that a remand would be "redundant" in view of the availability of non-evidentiary materials on which it could rely to make *de novo* findings of fact.[10]

Having announced a broad equitable estoppel against enforcement of the pollution-exclusion clause, the supreme court concluded that Morton itself could not benefit from the estoppel in this case. Morton's predecessors " '[knew] that the mercury and its effluent was harmful to the land over which it coursed and the waters into which it fell' " and thus, as to Berry's Creek, Morton fits within the class of intentional dischargers of known pollutants against whom the pollution-exclusion clause may still be enforced. (App. 113a; *see* App. 103a-05a.) Hence, in a Pyrrhic victory for the insurers whose policies *sub judice* included the pollution-exclusion clause, the court upheld summary judgment against Morton on the basis of the clause. (App.

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[10] The court stated: "[T]he insurers urge that we not consider the regulatory history . . . without a fuller record, [but] we are persuaded that a remand would be redundant, and that this record together with the reported cases that address the regulatory history and the abundant independent commentary on the subject affords an accurate and comprehensive basis for our determination." (App. 35a.) Despite the court's use of the phrase "fuller record," there was in fact *no* evidentiary record on equitable-estoppel issues. *See* pp. 20-21 *infra*.

103a-05a.)[11] However, the court's broad estoppel ruling has already been followed by other courts, state and federal, applying New Jersey law.[12]

D. The Denial Of Petitioners' Motion For Reconsideration.

Petitioners timely sought reconsideration, arguing that the supreme court had denied them "their Fourteenth Amendment rights to due process" by imposing the equitable estoppel without allowing them "the opportunity to present a fully developed factual record and to rebut the evidence upon which the Court relied." (App. 221a; *see* App. 219a-24a.)[13] In support of their request for an

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[11] As to the other policies sued upon by Morton, the court upheld the determinations of the trial court and appellate division that there had been no "occurrence." (App. 105a-13a.)

[12] *See, e.g., Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 842 F. Supp. 125 (D.N.J. 1993); *Continental Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027 (D.N.J. 1993); *UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co.*, No. ESX-L-016044-90 (N.J. Super. Ct. Law Div. Mar. 16, 1994) (App. 249a-50a); *AT&T Co. v. Aetna Casualty & Surety Co.*, No. W-56581-88 (N.J. Super. Ct. Law Div. Nov. 19, 1993) (App. 257a-58a). Review is fully available to petitioners even though the supreme court affirmed summary judgment against Morton with respect to its claims concerning Berry's Creek. Morton now has obtained a ruling adverse to petitioners under the pollution-exclusion clause, and the general estoppel announced under New Jersey law by New Jersey's highest court has been and will be invoked against petitioners by others whose policies contain the clause as well. Petitioners are entitled to seek relief from these adverse aspects of the judgment below. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334-35 (1980); *Electrical Fittings Corp. v. Thomas & Betts* Co., 307 U.S. 241 (1939).

[13] As noted above, invoking considerations of fundamental fairness, petitioners requested a remand on any regulatory history issues even in advance of the supreme court's decision. However, the motion-for-reconsideration request alone would have sufficed to preserve petitioners' due process claim. *See, e.g., Saunders*, 244 U.S. at 320 ("[t]he defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance"); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980).

evidentiary hearing, petitioners sought to show that there was no foundation for the supreme court's *de novo* factual determinations regarding misrepresentation, reliance, and detriment. In particular, with *amicus* support, petitioners presented 44 affidavits of 1970-era insurance regulators, including that of Jerome Steen, who in 1970 was the New Jersey Department of Insurance analyst responsible for review of the proposed clause.[14]

Like numerous other 1970-era regulators, Mr. Steen swore under oath (1) that the 1970 IRB/MIRB presentations were not misleading, (2) that his Department carefully considered the proposed clause and understood its significance, and (3) that no rate reduction had been in order. These affidavits, further discussed at pp. 24-29 *infra*, demonstrated vividly that sharply contested issues of fact exist as to each of the factual prerequisites of an equitable estoppel. Nonetheless, the supreme court denied reconsideration without comment on January 11, 1994. (App. 198a-201a.)

REASONS FOR GRANTING THE WRIT

It is beyond dispute that the Due Process Clause protects the insurer interests implicated here, and the core due process protections also are well-established.[15] The special and important question raised by this case is whether

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[14] Mr. Steen's affidavit is reprinted in full in the Appendix, along with the affidavits of four other 1970-era regulators from Massachusetts, Montana, New York, and South Carolina. (App. 232a-48a.) In addition, 15 other affidavits on reconsideration are reproduced in Edward Zampino, et al., *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847, 881-920 (1993). The supreme court expanded the record to include these affidavits. (App. 202a.)

[15] Due process requires that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Contract rights such as those vitiated below have long been recognized as property interests meriting full due process protection. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

state supreme courts can dispense altogether with due process protections in favor of *de novo* appellate fact-finding based on judicial notice of various case reports, journal articles, and other non-evidential materials. As shown by the decision below, this question is of critical significance in modern, complex civil litigation, an area to which this Court has seldom spoken. *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 Texas L. Rev. 579 (1984) (unlike the areas of criminal procedure and administrative procedure, "civil procedure . . . has remained relatively untouched [by the Supreme Court]").

The need for this Court's review is especially urgent because the decision below conflicts squarely with two decisions of this Court. First, on remarkably similar facts, the Court held in *Ohio Bell*, 301 U.S. at 296-300, that a state administrative agency may not interject factual issues into a proceeding at the last moment and then summarily resolve them by reference to case reports, journal articles, and fragmentary records of other proceedings. This Court has not had occasion to apply the principles of *Ohio Bell* to state appellate courts, and should do so here. *See Garner v. Louisiana*, 368 U.S. 157, 173 (1961) (dictum assuming *Ohio Bell* is applicable to state trial courts).

The decision below also conflicts with *Saunders*, 244 U.S. at 319, where the Court held that, if litigants have not had "the proper opportunity to present [rebuttal] evidence," a state supreme court must remand after announcing the governing legal principles. This case shows the need to affirm the continuing vitality of *Saunders* in the Information Age, when new tools such as electronic databases will tempt appellate courts to substitute trial by judicial notice for the constitutionally guaranteed rights of notice and "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

In addition to raising special and important constitutional issues, this case has considerable practical significance. Beyond the billions of dollars at stake in New Jersey, the decision below has been widely noted in legal

and insurance publications. Other jurisdictions facing enormous pollution clean-up costs will be tempted to follow New Jersey's lead even though, as shown in Part II below, there is no factual foundation whatever for imposition of an equitable estoppel. Indeed, in dissenting from a denial of rehearing, three of the seven justices of the Supreme Court of Florida already have expressly concluded that Florida courts should "apply the estoppel rule of the New Jersey Supreme Court."[16] In addition, to date policyholder counsel have urged at least six other state supreme courts to follow the decision below.[17] Thus, there is a grave danger that this New Jersey decision, itself reached in disregard of the Due Process Clause, will serve as the basis for future rulings in other jurisdictions denying petitioners a meaningful opportunity to be heard. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1335-36 (1994) (Scalia, J., dissenting from denial of certiorari) (noting unfairness of state court reliance on prior case which itself lacked an evidentiary foundation).

More broadly, many major industries are now subject to complex state and federal regulatory programs, which often require regulatory approval for contractual arrangements. If a state court may equitably estop an industry from relying on contractual provisions approved by the

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[16] *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1994 WL 103058, at *3-4 (Fla. Mar. 31, 1994) (Overton, J., dissenting with Barkett, C.J., & Harding, J., from order denying rehearing). By contrast, a fourth justice noted that failure to give the pollution-exclusion clause its "plain and ordinary meaning" could not be justified by either "the drafting history of the . . . clause" or "the social premise that [judges] would rather have insurance companies [than policyholders] cover these losses." *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1993 WL 241520, at *6 (Fla. July 1, 1993) (Grimes, J., concurring).

[17] *See* briefs filed in *Republic Ins. Co. v. Sunshine Mining Co.*, No. 20699 (Idaho); *Board of Regents v. Royal Ins. Co.*, No. C1-93-24 (Minn.); *City of Portsmouth v. New Hampshire Ins. Guar. Assoc.*, No. 93-703 (N.H.); *Kerr-McGee Corp. v. Admiral Ins. Co.*, No. 81294 (Okla.); *Greenville County v. Insurance Reserve Fund*, No. 93-736 (S.C.); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, No. 59594-I (Wash.).

state's own regulators, due process mandates that the affected members of the industry must at least be given a meaningful opportunity to present evidence on disputed factual issues. If, instead, the Due Process Clause permits what the supreme court did below, then every regulated industry in the country is at risk of similar summary and retroactive deprivations. The consequences would be catastrophic for the interests protected by the Due Process Clause, and for the stability of contractually-based expectations essential to our complex economy.

I. THE DECISION BELOW CONFLICTS SQUARELY WITH *OHIO BELL TELEPHONE*, WHICH EXPRESSLY FORBIDS A TRIBUNAL TO INTERJECT FACTUAL ISSUES INTO A CASE AT THE LAST MOMENT AND THEN TO MAKE SUMMARY FACTUAL DETERMINATIONS BY REFERENCE TO CASE REPORTS, JOURNAL ARTICLES, AND FRAGMENTARY RECORDS OF OTHER PROCEEDINGS.

The New Jersey supreme court expressly refused petitioners an opportunity to create an evidentiary record on equitable-estoppel issues, preferring instead to engage in *de novo* fact-finding based on its own review of case reports, journal articles, and selected documents from regulatory archives. (App. 35a.) This case presents an important opportunity for this Court to hold that, where there are sharply contested issues of fact on dispositive issues, the Due Process Clause precludes state appellate courts from making summary and *de novo* factual determinations on the basis of such non-evidential materials. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

A. *Ohio Bell Telephone* Forbids State Administrative Agencies To Make Summary Factual Findings By Reference To Case Reports, Journal Articles, And Other Non-Evidential Material.

In *Ohio Bell*, after belatedly defining the issues, the public utilities commission resolved factual questions by

reference to certain "findings of a federal court in Illinois [concerning an affiliate]," "a recognized magazine," and selected "testimony and exhibits" from the Illinois litigation. 301 U.S. at 296-97, 300. This Court emphatically denounced the *Ohio Bell* proceedings as "condemnation without trial," upon the basis of "proofs drawn from the clouds." *Id.* at 300, 307. Rejecting this kind of trial by "judicial notice," Justice Cardozo wrote for the Court:

> [Judicial] notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. . . . "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." . . . [T]o press the doctrine of judicial notice to the extent attempted in this case *and to do that retroactively after the case had been submitted*, would be to turn the doctrine into a pretext for dispensing with a trial.

Id. at 301-02 (emphasis added; citations omitted).

Rather, Justice Cardozo continued, the Due Process Clause required observance of " 'the rudiments of fair play.' " *Id.* at 304 (citation omitted). These mandate a "fair and open hearing" *after* the issues in a proceeding are defined, with fairly "disputable" questions of fact to be resolved "upon the strength of evidential facts . . . spread upon the record." *Id.* at 300, 302, 304. The Court added: "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Id.* at 305; *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (citing *Ohio Bell* for the proposition that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation").[18]

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[18] *Ohio Bell* reflected principles which this Court has also recognized in many other contexts. While the extent of process owed of course

B. The Due Process Clause Must Equally Forbid State Supreme Courts To Make Summary And *De Novo* Factual Determinations On Critical Issues By Reference To Case Reports, Journal Articles, And Other Non-Evidential Materials.

Here, much as in *Ohio Bell*, it was only after the New Jersey supreme court's final decision invoking equitable-estoppel principles *sua sponte* that petitioners were apprised of the controlling *factual* issues. Yet the supreme court rejected petitioners' repeated requests for a "fair and open hearing" should the regulatory history be deemed relevant. 301 U.S. at 304. Instead, as detailed below, the court indulged in precisely the kind of summary trial by judicial notice condemned in *Ohio Bell*.

In *Garner*, this Court assumed in dictum that *Ohio Bell* applies to state trial courts as well as to administrative agencies. *See* 368 U.S. at 173. The conclusion that *Ohio Bell* must apply to courts is especially compelling here because the critical factual questions include (1) whether misrepresentations were made to state administrative agencies in 1970, (2) whether state regulators were misled by reliance thereon, and (3) whether state regulators otherwise would have required an exclusion-triggered rate de-

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varies depending upon the circumstances, at its core, the Due Process Clause requires (1) notice of the issues, *see Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 84-85 (1988); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); (2) the right to an appropriate hearing, *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes*, 407 U.S. at 82; *Bell v. Burson*, 402 U.S. 535, 541-42 (1971); *Boddie*, 401 U.S. at 378-79; *Brinkerhoff-Faris*, 281 U.S. at 678, 680-82; (3) the opportunity to present evidence on disputed material facts and, in appropriate circumstances, to challenge adverse evidence and witnesses through confrontation and cross-examination, *see Little v. Streater*, 452 U.S. 1, 13-16 (1981); *Greene v. McElroy*, 360 U.S. 474, 497-502 (1959); *Saunders*, 244 U.S. at 319; and (4) consideration by an unbiased tribunal, *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). These core protections must be extended no matter how late the issue arises in the proceedings below, *see Saunders*, 244 U.S. at 319-20; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), and even though the granting of an evidentiary hearing may cause additional delays, inefficiencies, and expense, *see Bell*, 402 U.S. at 540-41.

crease. If the 1993 New Jersey Department of Insurance had *sua sponte* consulted the case reports, journal articles, and 1970 regulatory records relied upon by the court below and purported summarily to revoke the 1971 regulatory approval on an equitable-estoppel theory, violation of *Ohio Bell* would be obvious to all. Surely there is no more room under the Due Process Clause for a state supreme court to predicate a final decision upon such "proofs drawn from the clouds." 301 U.S. at 307.

Case Reports. In refusing to remand for creation of an evidentiary record on equitable-estoppel issues, the supreme court identified "reported cases that address the regulatory history" as one of several resources that supposedly could substitute for such an evidentiary record. (App. 35a.) The supreme court then focused on six cases from other jurisdictions addressing the regulatory history in non-estoppel contexts. (*See* App. 78a-83a.)[19] While courts properly consult case reports for other purposes, under *Ohio Bell* a court cannot substitute perusal of case reports for a

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[19] *See Kipin Indus., Inc. v. American Universal Ins. Co.*, 535 N.E.2d 334 (Ohio Ct. App. 1987) (considering regulatory history in connection with arguments that the pollution-exclusion clause is ambiguous), *disapproved by, Hybud Eqpt. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096 (Ohio 1992); *Claussen v. Aetna Casualty & Surety Co.*, 380 S.E.2d 686 (Ga. 1989) (same); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. App. Ct. 1989) (same); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990) (same); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) (same), *cert. denied*, 113 S. Ct. 1846 (1993); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992). *Joy*, which focused solely on the unique regulatory proceedings in West Virginia, relied on a doctrine of West Virginia law providing that "where a definite meaning has been ascribed to language used in an insurance policy, that meaning should be given to the language by the courts." *Id.* at 499. *Joy* neither discussed nor purported to apply the traditional common law doctrine of equitable estoppel, and the West Virginia court did not purport to reach conclusions about the elements of an equitable estoppel. Notwithstanding these decisions, numerous state and federal courts have enforced the pollution-exclusion clause consistent with what the supreme court agreed to be its "plain meaning." (App. 86a; *see* App. 55a-65a.)

litigant's right, with knowledge of the issues, to create an evidentiary record adequate in the circumstances of his or her case. *See* 301 U.S. at 297, 305-06.

It should not be necessary to belabor this point. However, several considerations highlight the offensiveness under the Due Process Clause of the supreme court's *de novo* fact-finding by reference to case reports in lieu of a remand for creation of an evidential record. First, *none* of those cases was decided under equitable-estoppel principles, nor did any involve the *New Jersey* regulatory process. Thus, the case reports did not address in any way the specific factual elements requisite to imposition of an estoppel under New Jersey law. Second, *none* of those cases involved an evidentiary hearing on the regulatory history, and thus none had any firmer grounding in an evidential record than does the decision below.

Moreover, there was no suggestion that these case reports were entitled to any res judicata effect. Even if some of the decisions elsewhere had involved equitable-estoppel issues, *these petitioners* would still be entitled to present *their* defenses under New Jersey law:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); *see also Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918). The due process limitations upon res judicata doctrine underscore the pressing need to prevent resolution of factual disputes by free-form judicial notice of case reports discussing, in the absence of an evidentiary record, the general subject of the regulatory history of the pollution-exclusion clause.

Journal Commentary. In refusing to remand, the supreme court also referenced the supposed availability of "abundant independent commentary" concerning the regulatory history and proceeded to cite 11 journal articles on the general topic (none purporting to conduct an equitable-estoppel analysis). (App. 35a; *see* App. 36a-52a.) Journal articles assuredly may be consulted for background but, under *Ohio Bell*, they cannot become the basis for summary resolution of disputed facts which are dispositive under the New Jersey supreme court's equitable-estoppel analysis. *See* 301 U.S. at 300-01. This is especially true because, despite the court's conclusory characterization of the commentary as "independent," the five articles on which the court relied most heavily were authored by policyholder counsel, *i.e.*, partisans in the very dispute the court was called upon to resolve.[20] The supreme court's action in relying so heavily on partisan journal articles is especially repugnant under the Due Process Clause. *See Kingsland v. Dorsey*, 338 U.S. 318 (1949) (upholding the Patent Office's disbarment of an attorney for citing as disinterested evidence an article procured by his client).[21]

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[20] *See* Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 Cornell L. Rev. 610 (1990) (cited six times); Robert D. Chesler, et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986) (three citations); George Pendygraft, et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 Ind. L. Rev. 117 (1988) (two citations); Thomas Reiter, et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. Cin. L. Rev. 1165 (1991) (seven citations); Robert N. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat—The Insurers' Last Word on Pollution Exclusion*, 5 Mealey's Lit. Rept. (Ins.) 27 (Oct. 8, 1991) (one citation and other apparent use). *Amicus* briefs were submitted to the New Jersey supreme court by the authors of three of these articles (or others from their law firms).

[21] To illustrate the need for a "fair and open hearing," rather than trial by partisan journal article (*Ohio Bell*, 301 U.S. at 304), it is noteworthy that the court below cited and relied upon certain factual allegations appearing in Robert N. Sayler, note 20 *supra*, in connection with misrepresentation and reliance issues. (*See* App. 51a-52a.) The

The "Record." The supreme court also referenced the "record" before it as a basis for summary and *de novo* fact-finding. (App. 35a.) But *no* factual "record" had been created in the lower courts on the equitable-estoppel issues; the supreme court apparently was referring to fragments of the 1970-71 Department of Insurance record put into the appellate docket by *amici* supporting Morton.[22] But the mere availability of such materials to an appellate court no more supports resolution of the factual issues here without an evidentiary hearing than did the availability of the similar fragmentary materials involved in *Ohio Bell*. *See* 301 U.S. at 297, 305-06. As this Court stated in *Interstate Commerce Comm'n v. Louisville & N.R.R.*, 227 U.S. 88 (1913):

> [W]here rights depended upon facts, [a tribunal cannot] . . . disregard all rules of evidence, and capriciously make findings by . . . fiat. Such authority, however beneficently exercised in one case, could be

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court, however, ignored altogether four equally pertinent articles by insurer counsel published in the same source and submitted in support of petitioners, two of which specifically and in detail rebut the allegations in Mr. Sayler's article. *See* Victor C. Harwood, III, et al., *The "Frivolity" of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Lit. Rept. (Ins.) 19 (Aug. 27, 1991); Victor C. Harwood, III, et al., *The Emperor's Illusionist: Policyholders Retreat from Pollution Exclusion Extrinsic Evidence* (Part I), 6 Mealey's Lit. Rept. (Ins.) 17 (May 5, 1992) and (Part II), 6 Mealey's Lit. Rept. (Ins.) 21 (May 12, 1992); Brian J. Coyle, et al., *The West Virginia Regulatory Filings and Extrinsic Evidence of the "History" of the Pollution Exclusion*, 6 Mealey's Lit. Rept. (Ins.) 17 (Oct. 20, 1992). The unacknowledged existence of articles disputing Mr. Sayler's allegations highlights the fact that the supreme court summarily resolved disputed factual questions without any evidentiary record. Neither the policyholders' articles nor the insurers' articles are a substitute for the due process right to present and confront evidence.

[22] The trial-court record did not even include copies of IRB/MIRB's 1970 submissions to the New Jersey Department of Insurance. Copies of various New Jersey regulatory documents, including the 1970 MIRB submission, were first presented at the supreme court level by the *amici* supporting Morton. (App. 227a-31a.) Morton, in turn, suggested that the supreme court take "judicial notice" of the 1970 MIRB submission. (App. 211a n.4.)

> injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

Id. at 91. The decision below merits the same condemnation.

C. Without The Guidance Of This Court, Parties Embroiled In The Widely-Litigated Controversies Characteristic Of Modern Civil Litigation Will Increasingly Be Denied Basic Due Process Protections.

This Court has a tradition of "zeal[ ] to protect" due process rights in "all types of cases." *Greene v. McElroy*, 360 U.S. 474, 497 (1959). Beyond its own merits and importance, this case warrants review because it reveals the emergence of significant new threats to due process rights in the context of widely-litigated controversies involving whole industries. The controversy over the pollution-exclusion clause has a broad sweep, involving 49 jurisdictions, hundreds of insurers, thousands of polluted sites, and even larger numbers of polluting entities. These circumstances have led to myriad pollution-exclusion cases pitting large numbers of policyholders against large numbers of insurers in large numbers of jurisdictions. (*See* App. 52a-83a.)

Although the pollution-exclusion clause is at issue in many cases, fundamental principles of due process entitle *these petitioners*, in *this case* of first impression under New Jersey law, to a " 'fair opportunity procedurally, substantively and evidentially' " to show that the facts did not support the equitable estoppel announced by the court below. *Blonder-Tongue*, 402 U.S. at 333. In the simpler and more traditional *Harr* case, where only $7,500 was at stake, the Supreme Court of New Jersey readily recognized as much and remanded for fact-finding on equitable-estoppel elements after announcing the governing legal principles. *See* 255 A.2d at 212, 219-21. Here, however, amid the masses of non-evidential material accumulated from pollution-exclusion cases litigated elsewhere (concerning issues other than equitable estoppel), the supreme court

lost sight of " 'the rudiments of fair play' " and refused a remand where petitioners could marshal their defenses. *Ohio Bell*, 301 U.S. at 304 (citation omitted).[23]

Without this Court's guidance, future litigants are sure to suffer similar violations of due process as courts continue to be presented with non-evidential material within the context of widely-litigated controversies. By their very nature, widely-litigated controversies proliferate case reports and journal articles which are carefully tracked by organized bars and often are instantly available to courts through Information Age tools such as computerized databases. Litigants and courts alike may be tempted to misuse such resources as a substitute for creation of an evidentiary record, as happened below and as the decision below has been urged elsewhere. This threat is particularly pernicious at the appellate-court level, where the tools for adversary testing of such materials are severely restricted.

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[23] The supreme court disregarded due process guarantees not only in summarily resolving the questions of misrepresentation, reasonable reliance, and detriment addressed in Part II below, but also in purporting to estop the "insurance industry" from enforcing the pollution-exclusion clause under New Jersey law. (App. 90a.) Under *Harr*, an equitable estoppel may be imposed when "an insurer or its agent" misrepresents coverage. 255 A.2d at 219. Here, the alleged 1970 misrepresentations were made by two membership service organizations, IRB and MIRB, which made specific submissions limited to the particular pollution-exclusion clause proposed and favored by their member insurers, which did not include petitioners Insurance Company of North America and Continental Casualty Company. In 1970, various other insurers proposed their own and different pollution-exclusion clauses, only later adopting the IRB/MIRB clause. Thus, in refusing a remand, the court below did not allow an opportunity for insurers to demonstrate that they could not be equitably estopped because neither they nor any agent of theirs had made any supposed misrepresentation. *See Omrod v. New Jersey Dep't of Civil Serv.*, 376 A.2d 554, 556-57 (N.J. Super. Ct. App. Div.) (estoppel cannot be imposed against persons not implicated in the improper action), *certif. denied*, 384 A.2d 513 (N.J. 1977), *disapproved on other grounds, O'Malley v. Department of Energy*, 537 A.2d 647, 651 (N.J. 1987); *United States v. Florida E.C. Ry.*, 410 U.S. 224, 244-45 (1973) (recognizing the due process right for differently situated persons to submit proof differentiating themselves from others in judicial proceedings); App. 220a, 224a.

In addition to these threats to the integrity of the traditional litigation "record," all manifest here, courts may be tempted to seek shortcuts past due process requirements in cases of great complexity or local significance. Accordingly, this Court's review is required to assure that litigants embroiled in complex and widespread controversies sufficiently important to beget numerous case reports and journal articles are not by that very fact put at risk of deprivations of property or liberty without observance of fundamental due process protections.

II. THE DECISION BELOW CONFLICTS SQUARELY WITH *SAUNDERS v. SHAW*, WHICH EXPRESSLY FORBIDS STATE SUPREME COURTS TO RESOLVE DISPUTED FACTUAL ISSUES AGAINST LITIGANTS WHO HAVE NOT HAD OCCASION OR OPPORTUNITY TO PRESENT REBUTTAL EVIDENCE.

In denying petitioners an opportunity to create an evidentiary record on the belatedly injected equitable-estoppel issues, the decision below also conflicted squarely with this Court's decision in *Saunders*, 244 U.S. at 319. There, the Supreme Court of Louisiana premised its decision on certain evidence which the trial court had ruled inadmissible when proffered by the plaintiff. Writing for the Court, Justice Holmes held that the Louisiana supreme court violated the Due Process Clause by basing its decision on matter which the defendant had neither the occasion nor the opportunity to rebut. *Id.* at 318-19. Rather, due process required a remand to allow the defendant "the proper opportunity to present [rebuttal] evidence." *Id.* at 319.[24]

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[24] *See also Little*, 452 U.S. at 14, 16-17 (recognizing indigent's right to rebuttal evidence under the Due Process Clause); *Hamling v. United States*, 418 U.S. 87, 110 n.11 (1974) (the Due Process Clause permits litigants "full latitude in rebutting every factual issue"); *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (the "right to present evidence is . . . essential to the fair hearing required by the Due Process Clause"); *Greene*, 360 U.S. at 496 (fundamental fairness requires "an opportunity to show that [adverse evidence] is untrue"); *Brinkerhoff-Faris*, 281 U.S. at 678, 680-82 (state procedures must allow litigants a "real opportunity to protect" their interests); *Carter v. Morehouse Parish School Bd.*, 441

Here, the New Jersey court likewise denied due process in refusing a remand on equitable-estoppel issues. To establish a violation of *Saunders*, it is of course not necessary that petitioners show here that they ultimately will prevail on the equitable-estoppel issues in New Jersey's courts. *See* 244 U.S. at 319. Rather, the Due Process Clause guarantees petitioners an opportunity to be heard if critical factual matters are fairly "disputable" or "arguable." *Ohio Bell*, 301 U.S. at 302; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544-46 (1985). That threshold is more than satisfied here. There was *no* evidentiary record on estoppel issues when the supreme court rendered its decision; moreover, petitioners' motion for reconsideration was supported by 44 affidavits of 1970-era regulators disputing the supreme court's factual determinations concerning the equitable-estoppel elements of misrepresentation, reasonable reliance, and detriment. In order to illustrate the prejudice they suffered when denied a remand, petitioners summarize below the showing they would make on remand to rebut the supreme court's summary inferences that the facts here support imposition of an equitable estoppel.

A. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Prerequisite Of Misrepresentation Is Not Satisfied Here.

The supreme court identified only one alleged act of IRB/MIRB misrepresentation to New Jersey regulators in 1970, the submission of a one-page explanatory memorandum ("Explanation") having one allegedly misleading paragraph. (App. 42a-46a.)[25] The deception perceived by the

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F.2d 380, 382 (5th Cir.) ("ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process"), *cert. denied*, 404 U.S. 880 (1971).

[25] That paragraph stated:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution

court lies in IRB/MIRB's supposed failure to "fully and unambiguously disclose[ ]" that the proposed pollution-exclusion clause would "sharply and dramatically . . . restrict the coverage" for pollution damage under "occurrence"-based CGL policies. (App. 34a, 94a.) On remand, petitioners would have shown that this single paragraph cannot be condemned as a misrepresentation because the statements made in it were accurate when made.

In condemning the Explanation as misleading, the supreme court focused on the *present* impact of the pollution-exclusion clause after the dramatic post-1970 expansion in environmental liabilities. (App. 94a-95a.) But, *in 1970*, policyholder claims for pollution-damage liability were relatively rare and typically involved normal operational pollution. The resulting property damage was therefore considered by insurers to be "expected [or] intended from the standpoint of the insured," and hence to be outside "occurrence" coverage under the 1966 policy. (*See* note 4 *supra*.) If petitioners' version of the real world in 1970 is correct, the IRB/MIRB memorandum was not at all misleading in stating that the then-proposed exclusion would not change coverage "in most cases." (App. 230a.)

This Court's decision in *Ohio Bell* requires that factual determinations about the pollution-liability conditions prevailing in 1970 be based on *evidence*, rather than the judicial speculation on which the supreme court relied. *See* 301 U.S. at 301 ("a court takes judicial notice of the fact that Confederate money depreciated in value during the [Civil War] . . . , but not of the extent of the depreciation at a given time and place") (citations omitted). The need for *evidence* on this point was underscored by the 44 af-

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> or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

(App. 230a; *see* App. 42a.) The court discussed other supposed misrepresentations to regulators in Georgia, Kansas, West Virginia, and Puerto Rico in submissions that simply tracked the language of the Explanation. (*See* App. 46a-50a.)

fidavits submitted in support of petitioners' motion for reconsideration. Thus, for example, Jerome Steen, the responsible New Jersey regulator, expressly stated under oath that the Explanation was *not* misleading because "[c]laims for environmental damage were not common at the time." (App. 232a-33a ¶ 5.) The former Montana Insurance Commissioner averred:

> 4. Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.

(App. 239a; *see also* App. 237a ¶ 4; App. 242a ¶ 6; App. 246a-47a ¶¶ 3, 8.) Under *Saunders*, petitioners were entitled to "put [their] evidence in" on this point to rebut accusations of misrepresentation. 244 U.S. at 319.

B. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Element Of Reasonable Reliance Is Not Satisfied Here.

Under New Jersey law, the second prerequisite to imposition of an equitable estoppel here is that the New Jersey regulators "reasonably relie[d]" upon IRB/MIRB's supposed misrepresentations. *See Harr*, 255 A.2d at 219. On this point, the supreme court stated that "the IRB misled [New Jersey's] insurance regulatory authority" and that regulatory authorities "would not readily have understood" that the exclusion barred coverage in the absence of an abrupt and accidental discharge. (App. 35a, 90a.) The fundamental unfairness of the supreme court's summary fact-finding is particularly self-evident with respect to this estoppel element.

First, since there had been no evidentiary proceedings on equitable-estoppel issues, there was *no* record evidence

(and the supreme court pointed to nothing) purporting to show that New Jersey's 1970 regulators, themselves insurance experts, failed to comprehend the then-proposed exclusion due to reliance on the Explanation.[26] Rather, the supreme court simply deemed the reliance element satisfied on the basis of its own summary inferences. The court's approach not only violated the due process prohibition against decisions lacking evidentiary foundation (*Louisville*, 227 U.S. at 93), but also violated the holding in *Ohio Bell* that tribunals may not summarily resolve matters which "can be known only to the experts." 301 U.S. at 301. Before suffering an estoppel, petitioners were entitled to present their evidence about what expert regulators "would . . . have understood" in 1970. (App. 35a.)

The importance of allowing such rebuttal was underscored when numerous 1970-era regulators swore under oath that they had in fact understood perfectly well that pollution-damage claims would be barred in the absence of abrupt and accidental discharges. After showing in detail that the proposed exclusion was evaluated carefully and at length by numerous personnel in the New Jersey Department of Insurance, the affidavit of Jerome Steen concludes:

> 15. Whatever [per]spective twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.

(App. 236a; *see* App. 237a-38a ¶¶ 2-6; App. 239a-40a ¶¶ 2-3, 5, 7; App. 241a-43a ¶¶ 4-9; App. 246a-48a ¶¶ 3-10.) Again, under *Saunders*, petitioners were entitled to "put [their] evidence in" showing that regulators had not been led astray by reliance on the Explanation. 244 U.S. at 319.

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[26] The very suggestion is inherently implausible because the court agreed with petitioners that the exclusion has a "plain meaning." (App. 86a; *see* App. 34a-35a.)

C. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Element Of Detriment Is Not Satisfied Here.

The third prerequisite to an equitable estoppel under *Harr* is "ultimate detriment," which the supreme court found satisfied here because of the absence of an exclusion-triggered rate reduction. *Harr*, 255 A.2d at 219; App. 86a-90a. Without any evidentiary foundation whatever, the court reasoned that, had the 1970 regulators understood the import of the proposed exclusion, a "significant rate reduction" (which did not occur) would have been "*inescapable*." (App. 87a (emphasis added).)

Once again, however, the proper rate impact of a proposed exclusion from CGL policies is something which "can be known only to the experts" and hence is *not* something about which a court, in the absence of an evidentiary record, can reach an "inescapable" conclusion. *See Ohio Bell*, 301 U.S. at 301. On remand, petitioners would have shown that, in 1966, no rate increase had been sought due to the conversion of coverage to an "occurrence" basis. (*See* pp. 3-4 *supra*.) Thus, there was no occasion in 1970 for proponents of the pollution-exclusion clause to propose a rate decrease (nor for regulators to impose one) when returning coverage of pollution risks alone to an "accident" basis.

Moreover, once this factual issue was belatedly brought into focus, 1970-era regulators swore under oath that, absent loss experience prior to 1970, there was no basis to rate the pollution exposure or calculate a premium adjustment. The affidavit of Jerome Steen makes precisely that point, concluding that "[i]n such circumstances, it was an accepted procedure to allow existing rates to prevail, . . . [and] rates [subsequently] would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected." (App. 235a ¶ 13.) Sworn testimony from the 1970 Massachusetts Insurance Commissioner demonstrates just how far afield the supreme court's speculation took it on the detriment issue:

> 7. The lack of a premium reduction when the exclusion was approved did not mean the exclusion's restrictive effect was not understood in my department. Pollution claims were quite rare in 1970. This was many years before the age of Superfund. There was no way to rate the exposure at that time. Premiums would have been adjusted prospectively as loss data was compiled.

(App. 238a; *see* App. 240a ¶ 6; App. 243a-44a ¶ 10; App. 247a ¶ 8.) Here, then, is another glaring indication of the prejudice suffered by petitioners when the supreme court refused a remand which would have allowed petitioners to show that the facts do not support imposition of an equitable estoppel.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of New Jersey.

Dated: May 11, 1994

Respectfully submitted,

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FILED

(2)

No. 93- 931797 MAY 11 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF NEW JERSEY

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134 N.J. 1

MORTON INTERNATIONAL, INC., successor to Morton Thiokol, Inc., now named Thiokol Corporation,
Plaintiff-Appellant and Cross-Respondent,
v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, A Pennsylvania Corporation (Successor to the Potomac Insurance Company and the United States Branch of General Accident Fire and Life Assurance Corporation, Ltd.); AFFILIATED FM INSURANCE COMPANY, A Rhode Island Corporation; CONTINENTAL CASUALTY COMPANY, An Illinois Corporation; FIRST STATE INSURANCE COMPANY, A Delaware Corporation,
Defendants-Respondents,
and

LIBERTY MUTUAL INSURANCE COMPANY, A Massachusetts Corporation; AMERICAN HOME ASSURANCE COMPANY, A New York Corporation; INSURANCE COMPANY OF NORTH AMERICA, A Pennsylvania Corporation; UNDERWRITERS AT LLOYD'S LONDON, and Certain Subscribing London Market Insurance Companies,
Defendants-Respondents and Cross-Appellants,
and

AETNA CASUALTY & SURETY COMPANY, A Connecticut Corporation; AMERICAN CENTENNIAL INSURANCE CO., A Delaware Corporation; FIREMAN'S FUND INSURANCE COMPANY, A California Corporation; GRANITE STATE INSURANCE COMPANY, A New Hampshire Corporation; THE HARTFORD ACCIDENT &

INDEMNITY COMPANY, A Connecticut Corporation; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, A Pennsylvania Corporation; INTEGRITY INSURANCE COMPANY, A New Jersey Corporation; INTERNATIONAL INSURANCE COMPANY, An Illinois corporation; LEXINGTON INSURANCE COMPANY, A Delaware Corporation; MISSION INSURANCE COMPANY, A California Corporation; MISSION NATIONAL INSURANCE COMPANY, A California Corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, A Pennsylvania Corporation; and NORTHBROOK INSURANCE COMPANY, An Illinois Corporation,
Defendants.

November 30, 1992, Argued
July 21, 1993, Decided

COUNSEL: George F. Kugler, Jr., argued the cause for plaintiff-appellant and cross-respondent (Archer & Greiner, attorneys; Mr. Kugler, Edward C. Laird, and Gary J. Lesneski, on the briefs). Haddonfield.

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Paul R. Koepff, New York City, a member of the New York Bar, argued the cause for defendants-respondents and cross-appellants Underwriters at Lloyd's London, and certain subscribing London Market Insurance Companies (Ronca, McDonald & Hanley, Livingston, attorneys for Underwriters at Lloyd's London; Mudge, Rose, Guthrie, Alexander & Ferdon, attorneys for Insurance Company of North America; and Golden, Rothschild, Spagnola & DiFazio, attorneys for American Home Assurance Co.; Mr. Koepff, New York City, Robert J. Kovacs, Livingston, Paul A. Leodori, W. Cary Edwards, Stephen V. Kovarik, New York City, and Charles W. Miller, III, Somerville, of counsel).

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JUDGES: STEIN, Wilentz, Handler, Pollock, O'Hern

The opinion of the Court was delivered by STEIN, J.

This case concerns insurance coverage for environmental pollution. The events affecting the coverage claims before us span a period of several decades, in the course of which societal indifference concerning environmental-pollution damage has been supplanted by a heightened awareness of the need for environmentally-sound waste-disposal practices and an increasingly aggressive governmental effort to remediate the consequences of past environmental damage. That evolution understandably has influenced the insurance industry's concern about its exposure for damages caused by environmental pollution, and has resulted in an industry-wide determination to modify the scope of insurance coverage for such damages.

The claims for coverage involve Comprehensive General Liability (CGL) policies covering plaintiff and its predecessors during the period 1961 to 1976, issued by three primary carriers and a large number of excess carriers. Four principal variations of CGL policies are involved, and no dispute exists concerning the language of the critical provisions that affect the question of coverage. Because the policies are essentially standardized, industry-wide forms, our interpretation of their coverage provisions may affect significantly the allocation of damages for environmental pollution of New Jersey property among insurance carriers, industry, and government. The scope of the relief sought by plaintiff requires us to consider not only the kinds of pollution-causing events entitled to coverage under the various policies, but also whether remediation expenses and response costs imposed under the authority of federal and state environmental statutes constitute sums that the insured is legally obligated to pay "as damages" because of property damage covered by the policies. Because the economic consequences are significant, the issues before us already have generated a multiplicity of reported decisions by federal and state courts.

I

The procedural history and material facts are set forth in abundant detail in the Appellate Division's comprehensive and thoughtful opinion. *Morton Int'l v. General Accident Ins. Co.*, 266 *N.J. Super.* 300, 629 A.2d 895 (1991). A useful perspective concerning that history and those facts is afforded by this Court's opinion in *New Jersey Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 *A.*2d 150 (1983). Plaintiff, Morton International, Inc. (plaintiff or Morton), is the successor in interest to Ventron Corporation (Ventron), and the claims it now asserts derive from liability imposed on Ventron in that litigation. The Department of Environmental Protection (DEP) had instituted suit against Ventron and other defendants, Velsicol Chemical Corporation (Velsicol), Wood Ridge Chemical Corporation (Wood Ridge), and F.W. Berk and Company (Berk), to compel the defendants to bear the costs involved in remediating pollution of Berry's Creek, an estuary of the Hackensack River, that had been caused by discharges from a mercury-processing plant operated for over forty years by the various defendants. Justice Pollock's opinion graphically described the end result of the defendants' prolonged discharge of mercury and other pollutants:

> Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury. For a stretch of several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. The waters of the creek are contaminated by the compound methyl mercury, which continues to be released as the mercury interacts with other elements. Due to depleted oxygen levels, fish no longer inhabit Berry's Creek, but are present only when swept in by the tide and, thus, irreversibly toxified.

[*Id.* at 481-82, 468 A.2d 150.]

This Court determined that the discharging of toxic mercury constituted an abnormally-dangerous activity, and imposed strict liability under common-law principles against all the defendants for remediation of the resulting nuisance and property damage. *Id.* at 493, 468 A.2d 150. We also held that all the defendants were jointly and severally liable under the Spill Compensation and Control Act of 1977 (Spill Act), *N.J.S.A.* 58:10-23.11 to -23.11z, as amended, L. 1977, c. 346, § 4, and that such liability would apply retroactively to discharges that had occurred prior to the Spill Act's effective date. *N.J.S.A.* 58:10-23.11f(b)(3) (as amended, L. 1979, c. 346, § 4; L. 1981, c. 25, § 1). Id. at 496-99, 468 A.2d 150. Finally, we affirmed the judgment entered on the cross-claim asserted by Robert and Rita Wolf, purchasers of the plant property from Ventron, premised on Ventron's fraudulent nondisclosure that the property had been contaminated by mercury pollution. *Id.* at 503-04, 468 A.2d 150.

When DEP instituted its action against Ventron, the insurers of the various owners and operators of the mercury-processing plant disclaimed coverage, requiring Ventron to retain counsel to provide a defense. At the conclusion of that litigation Morton, as Ventron's successor, commenced this declaratory-judgment action, seeking reimbursement for the costs incurred in defending the suit filed by DEP and the cross-claim filed by the Wolfs, as well as indemnity for the cleanup and remediation expenses resulting from the DEP proceeding. Defendants are the primary and excess insurers of Ventron and its predecessors during the period with respect to which Morton seeks reimbursement and indemnity.

Early in the litigation, the trial court granted partial summary judgment in favor of all defendants concerning their obligation to defend and indemnify Ventron with respect to the Wolfs' cross-claim. The parties filed cross-

motions for summary judgment on the remaining issues: defendants asserted that the record presented no material disputed factual issue concerning whether Morton's predecessors had intended or expected to cause property damage, whereas Morton contended that the Chancery Division was bound by the trial court's determination in *Ventron* that no intent "to pollute the waters of the State" had been proved. Those motions resulted in a ruling by the Chancery Division that none of the defendants was obligated to indemnify Morton for the costs of remediation of environmental damage—the amount of which remains undetermined—that were imposed on Ventron in the DEP litigation. Only General Accident Insurance Company of America (General Accident) was held liable for a portion of Ventron's costs in defending the DEP suit. In a separate trial, Morton was awarded judgment against General Accident for approximately $ 100,000 for such defense costs, plus attorneys' fees for prosecuting the claim to recover those costs. On appeal, the Appellate Division affirmed the Chancery Division's judgment dismissing Morton's claims for indemnification, and reversed that portion of the judgment awarding damages and counsel fees against General Accident. We granted Morton's petition for certification and the joint cross-petition for certification of defendants Insurance Company of North America, American Home Assurance Co., Liberty Mutual Insurance Co., Certain Underwriters at Lloyd's, London, and Certain London Markets Insurance Companies, 127 *N.J.* 563, 606 A.2d 374 (1992).

A. *Insurance Coverage*

For purposes of the summary-judgment motions, no issue was raised concerning which insurers provided primary and excess coverage during the pertinent periods. Similarly, the relevant provisions of the various policies also appear to be undisputed.

Primary Insurance Coverage

1. Defendant General Accident has stipulated that it and its affiliate provided primary general-liability coverage from October 1960 to October 1971. (Although copies of the policies actually issued to Morton's predecessors were not produced, the record contains sample forms of policies used by General Accident that the parties acknowledged, for purposes of summary judgment, corresponded to the actual policies.) Three different policy forms were in use by General Accident during this period.

(a) From October 1960 to October 10, 1964, General Accident's policy provided property-damage-liability coverage for "all sums which the Insured shall become legally obligated to pay * * * for damages because of injury to or destruction of property * * * caused by accident." The term "accident" was undefined. The policy afforded coverage "only to occurrences or accidents which happen during the policy period * * *."

(b) Effective October 10, 1964, the prior form of policy was amended by deleting the words "caused by accident" and substituting the words "resulting from an occurrence." The endorsement also added the following definition of occurrence:

> The word "occurrence" as used in this endorsement means an unexpected event or happening which results in injury to or destruction of tangible property during the policy period, or a continuous or repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period provided the insured did not intend or anticipate that injury to or destruction of property would result * * *.

(c) Effective October 1, 1966, and continuing through October 1971, General Accident's policy revised the definition of occurrence as follows:

> "Occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

2. Although neither the record nor the opinions below indicates the source of Ventron's CGL coverage from October 10, 1971, to June 1972, primary CGL coverage was provided from June 14, 1972, through January 1, 1975, pursuant to three policies issued by Reserve Insurance Company (Reserve), which had been declared insolvent and liquidated prior to the institution of this litigation. Each of Reserve's policies provided coverage for "all sums which the Insured shall become legally obligated to pay as damages because of property damage * * * caused by an occurrence," and their definition of "occurrence" was substantially identical to the definition contained in General Accident's policies from October 1966 to 1971. Reserve's policies for the period June 14, 1973, to June 14, 1975, however, contained a so-called "pollution-exclusion clause" that was identical to exclusion "f" of the standard form CGL policy (standard pollution-exclusion clause), see, *e.g.*, Insurance Services Office ("ISO") form GL 00 02, Ed. 01-73, that had been widely used by insurers from 1973 to 1985. That exclusion stated:

> This insurance does not apply * * * (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

3. Liberty Mutual Insurance Company (Liberty Mutual) provided primary CGL coverage to Ventron from January

1, 1975, through January 1, 1977. Its policies afforded coverage for "all sums which the insured shall become legally obligated to pay as damages because of * * * property damage * * * caused by an occurrence." The policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in * * * property damage neither expected nor intended from the standpoint of the insured * * * ." The Liberty Mutual policies also contained the standard pollution-exclusion clause.

Excess Insurance Coverage

Although the record is incomplete concerning the periods of coverage and the material terms of all the excess insurance coverage that Ventron and its affiliates purchased during the relevant period, we set forth a brief summary of that coverage and, where available, the material provisions affecting coverage.

1. (1972-1978)

Defendant Affiliated FM Insurance Company (Affiliated FM) provided first-layer excess-liability coverage from March 1, 1972, to January 1, 1978, pursuant to two policies. The initial policy defined "occurrence" to mean "either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to persons or tangible property during the policy period." The renewal policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." Affiliated FM's policies also contained the standard pollution exclusion clause.

Defendant First State Insurance Company provided second-layer excess coverage from March 1, 1972, to March 1, 1975. Its policy contained the same definition of "oc-

currence" as was contained in the initial Affiliated FM policy and also included the standard pollution-exclusion clause.

From March 1, 1975, to March 1, 1978, defendant American Home Insurance Company provided second-layer excess coverage. Its policies followed the form of the policies issued by Affiliated FM, the first-layer excess carrier, and contained the standard pollution-exclusion clause.

2. (1966-1972)

Defendant Insurance Company of North America (INA) apparently provided first-layer excess coverage to Ventron and its affiliates from March 17, 1966, to March 1, 1972, pursuant to four policies. By stipulation, claims asserted under the second policy covering the period March 17, 1969 to March 9, 1970, have been dismissed. Under the initial policy, "occurrence" was defined to mean "either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period." The third and fourth policies defined "occurrence" to mean "an injurious exposure to conditions which results, during the policy period, in personal injury, property damage or advertising injury neither expected nor intended from the standpoint of the insured." The initial INA policy, in effect from 1966 to 1969, contained a non-standard pollution-exclusion clause that provided:

> Waste Disposal Exclusion. It is agreed that this policy shall not apply * * * to injury to or destruction of property resulting from the intentional or willful disposal of any waste products, fluids or materials.

The third and fourth policies contained a different non-standard pollution-exclusion clause:

> This insurance does not apply: to bodily injury, personal injury or property damage arising out of pol-

> lution or contamination under that (1) caused by oil, or (2) caused by the discharge or escape of any other pollutants or contaminants, unless such discharge or escape results from a sudden happening during the policy period, neither expected nor intended from the standpoint of the insured.

Defendants Certain Underwriters at Lloyds, London and Certain London Markets Insurance Companies also provided excess coverage from November 1, 1966, to February 1, 1970, under two policies insuring against liability for property damage arising out of an "occurrence," defined to mean "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in * * * property damage * * * during the policy period." Those policies did not contain a pollution-exclusion clause.

3. (1960-1961)

Defendant Continental Casualty Company provided first-layer excess-liability coverage to Morton's predecessors from January 1960, to January 1961, for property-damage liability arising out of an "occurrence," defined to mean "an event, or continuous or repeated exposure to conditions, which unexpectedly or unintentionally caused injury, damage or destruction during the policy period." That policy contained no pollution-exclusion clause. Defendants Certain Underwriters at Lloyds, London and Certain London Markets Insurance Companies also provided second- and third-level excess coverage under two policies covering the period from March 15, 1960, to March 15, 1961, but the record is unclear concerning which of two different pollution-exclusion clauses those policies adopted. One of the clauses excludes

> liability imposed by law on the assured for * * * (3) property damage caused by seepage, pollution or contamination unless (a) such seepage, pollution or contamination is caused by accident and results in

> property damage during the period of the policy, or (b) subsequent to seepage, pollution or contamination an accident ensues which causes property damage during the period of the policy and then only for property damage proximately caused by such accident.

The other clause excludes liability imposed by law on the assured for "personal injuries or property damage resulting from any gradual cause such as subsidence, seepage, pollution or contamination." Our disposition does not require us to determine which clause was in force.

B. *Factual Background Pertinent to Resolution of Morton's Coverage Claims.*

The Appellate Division concluded, based on its examination of the extensive record, that the trial court properly had determined as a matter of law that Morton's predecessors had intended to cause environmental damage. 266 *N.J. Super.* at 333, 629 A.2d at 913. Before us, Morton asserts that the Appellate Division improperly "inferred intentional consequences" on the basis of "the intentional character of the acts of disposal," and contends that summary judgment was inappropriate in view of the sharply-conflicting evidence concerning the subjective knowledge and intent of Morton's predecessors. Morton also relies on the *Ventron* trial court's finding that the evidence in that case did not demonstrate an "intent to pollute":

> Surely Berk and W.R.C.C. intended to and volitionally did manufacture mercury compounds and dump waste on the Velsicol property. However, the Court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

Based on the *Ventron* trial court's conclusion, Morton argues that at the very least a triable issue of fact was

presented with respect to the subjective intent of Morton's predecessors.

We offer those preliminary observations to afford a perspective for the discussion to follow. Both the Chancery Division, as well as the Appellate Division, in concluding that Morton's predecessors inevitably had "intended to pollute Berry's Creek," 266 *N.J. Super.* at 333, 629 A.2d at 913, relied heavily on the conclusions reached by this Court in Ventron, based on expert testimony at trial, that "the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury," 94 *N.J.* at 481, 468 A.2d 150, and "[t]he contamination at Berry's Creek results from mercury processing operations carried on at the site for almost fifty years." *Id.* at 482, 468 A.2d 150. However, the record evidence relied on by the Chancery Division to demonstrate that Morton's predecessor had intended or expected environmental damage contains few references to mercury discharge, particularly during the 1950s and early 1960s. Rather, the record reflects that from the mid-1950s until institution of the *Ventron* suit, State officials consistently informed Morton's predecessors that they were discharging "unacceptable" emissions into Berry's Creek, accompanying those remonstrances with periodic reports analyzing the chemical content of the mercury plant's emissions. State officials insisted that remedial action be taken, but their warnings resulted only in a prolonged course of evasive action by the operating companies. The record reveals that not until 1970, however, did company officials expressly acknowledge that the "unacceptable" emissions had included discharges of mercury.

We first identify the relevant operating and parent companies. Berk operated the mercury-processing plant from 1929 to 1960, on a forty-acre tract west of Berry's Creek. In 1960, Wood Ridge, a wholly-owned subsidiary of Velsicol, purchased Berk's assets, including the property, and proceeded to operate the plant until 1974. In 1967, Wood Ridge distributed thirty-three of the forty acres to Velsicol

but was permitted to dispose of waste on Velsicol's portion of the tract. Ventron acquired all of Wood Ridge's capital stock in 1968, continuing to operate the plant until 1974, when it sold the plant assets to a chemical company and the 7.1-acre tract on which the plant had been located to Rita and Robert Wolf.

For a detailed summary of those portions of the record demonstrating knowledge by Morton's predecessors that their emissions into Berry's Creek were deleterious and unacceptable, as well as their failure over almost two decades to take remedial measures, we cannot improve on the Appellate Division's recapitulation of the documentary evidence, from which we quote at length:

> The record before Judge Huot demonstrated that as early as 1956 plaintiff's predecessor was informed that the effluent from the mercury processing plant contained an unacceptable level of pollutants. A report filed by two senior State Health Department public health engineers on April 9, 1956 detailed the results of their inspection of the property. These inspectors found that the plant consumed 60,000 gallons of water per day, about 90% of which was used for cooling purposes. Industrial wastes were produced from three buildings and consisted mostly of cooling water which had a high solid content, mainly insoluble dimethylcithiocarbonates which are organic and inorganic mercury compounds. The waste passed through a sedimentation tank from which the settled solids were recovered and reprocessed. The effluents from the settling tanks combined into a private sewer which discharged into an open ditch about 1200 feet from the plant, which in turn discharged the effluent into Berry's Creek at a point 2500 feet from the plant. Both public health engineers concluded that the combined effluent from the plant had an unacceptably high level of suspended solids and that the settling

tank serving the effluent from one of the buildings was not large enough.

On December 2, 1958 one of the public health engineers, John Wilford, again visited the property "to ascertain the current status of their program for the treatment or disposal of their industrial wastes in order to eliminate pollution of Berry's Creek." He reported that the company had not been successful in persuading the Wood-Ridge Sewage Treatment Plant to accept plaintiff's wastes. Wilford made an inquiry about having a large settling tank constructed with an outfall to Berry's Creek. Nothing about the processing at the plant had changed. Wilford explained to the company's vice-president that a settling tank would not, itself, reduce the pollution to acceptable limits and that if the company intended to continue discharging effluent into Berry's Creek it would have to submit plans and specifications to the Department of Health for approval. Wilford admonished the corporate official "that as this matter has been brought to [his] attention over two years ago, this department has a right to expect some appreciable progress toward the elimination of this problem." A four-point course of action was outlined to the company to which its vice-president agreed to comply. By March 17, 1959, however, it was clear to Wilford the company had made no progress "toward eliminating the polluting industrial waste therefrom from Berry's Creek." According to Wilford, the company was "cognizant" that its wastes contained mercury compounds which had to be removed.

In September 1959 and again in February 1960 Edward Griche, Inc. conducted an investigation into the nature of the waste emitted by the plant and the type of treatment which would clean the effluent. Both reports showed that the effluent from the processing plant contained many "deleterious characteristics"

which included high suspended solids concentration. The report explored several treatment methods, some of which had proven to be highly successful and relatively cheap.

The State Department of Health again inspected the premises on February 4, 1960 taking samples of the industrial waste effluent for the purpose of determining "the current pollutional potential of the wastes." The written report which issued after that inspection showed that the "pollutional aspect" of the company's wastes first came to the attention of the State Department of Health in 1956. Although the report indicates that the company was "very cooperative" and "desirous of rectifying the present pollution," it had yet to decide what type of treatment facility to install and was unable to negotiate for waste disposal with the Borough of Wood-Ridge. Samples of the effluent were taken from three buildings on the premises with a report noting that "no treatment as such is afforded the industrial wastes." The conclusion of this report, as in an earlier report, stated "the combined industrial wastes effluent from S.W. Berk & Company is unacceptable for discharge into Berry's Creek." The report warned that the decision as to the type of waste treatment to be effected had been under consideration for several years; the author threatened legal action to secure compliance with the pertinent statutes.

By March 22, 1960 the company knew that the municipal sewerage system would not be able to handle its wastes, even with pretreatment. A letter from the company to the Department of Health indicated, however, that the company was seeking "professional help on design of a treatment plant." By May 1960 it appeared that Velsicol would purchase Berk's property and assets. Velsicol was informed of the State Department of Health's inspection report of February

1960 and was told that Berk had been "planning to make certain installations to reduce the amount of pollution resulting from its operations. . . ." The sale was completed and the company's name changed to Wood-Ridge Chemical Corporation in July 1960. The State Department of Health again inspected the premises in August 1960 and issued a written report which noted that, despite the name change, "the official personnel remain the same as do also the chief production processes." At the time of this inspection, however, the plant was closed with full production expected to resume by October. Consequently, no sampling of waste was possible and the report merely noted that all production units produced wastes which flowed through a series of settling basins and united in a common ditch leading to Berry's Creek just below the outfall of the Wood-Ridge Sewerage Treatment plant. Settling was the only treatment of the waste provided and it was observed that some of the settling basins were in need of cleaning. Again, the company represented to department officials that it was "now planning to construct its own treatment devices."

The plant was again inspected on December 5, 1960. The department's analysis of the plant's effluents indicated "a deleterious waste due chiefly to its high turbidity, suspended solids and ether soluble content." The effluent sample taken during the December 1960 visit was removed from a 5-foot deep, 40-foot square lagoon which had recently been excavated behind the industrial property. That lagoon received all the industrial waste effluents from the plant buildings and acted as an additional settling tank with an average detention period of about two days. The lagoon effluent emptied into Berry's Creek through an underground storm drain pipe. The report concluded with the suggestion that the company proceed with its plans to install additional waste treatment equipment on the

premises in order to provide a nonpolluting final effluent.

In February 1964 the State's supervising engineer for the stream pollution control program wrote to the corporation's vice-president observing that a year prior the company informed the State Department of Health that it had contracted with consulting engineers to design suitable industrial waste treatment facilities to treat the lagoon effluent. The State complained that it received no engineering studies or proposals with respect to treatment facilities. Cautioning that the lagoon was nothing more than a temporary or preliminary step leading to treatability studies on the plant's effluents, Wood-Ridge Chemical was directed to advise the State of its treatment program status and when completion of a satisfactory facility would occur. In response, the company forwarded a "report on industrial waste treatment facilities, Wood-Ridge Chemical Corporation," authored by Clinton Bogert Associates, Consulting Engineers. Representatives from the company met with State Board of Health officials on August 5, 1964. At that time they reached an agreement in which the company was immediately to authorize final planning of new plant sewers and facilities for the collection and treatment of industrial wastes and to submit them to the department for approval within the next several weeks. These treatment facilities would be similar in general design to those recommended by the Clinton Bogert report. The effluent quality standards listed in the Bogert report would be adhered to as minimum requirements before the effluent was discharged into Berry's Creek and the existing waste-holding lagoon would be abandoned after completion and operation of the waste treatment facilities. This agreement was memorialized in a letter from the bureau to the company dated August 6, 1964.

By letter dated November 2, 1964 Wood Ridge reported to the Department of Health about its progress on the waste treatment facility. Wood Ridge promised that construction of a tile sewer and collecting sump for separation of process wastes would be completed by the end of November, after which further laboratory work would be done on the effluent and final plans for the treatment plant could be completed by March 31, 1965. The department responded by seeking greater haste on the company's part and indicating the hope that an adequate design and construction of a treatment project would be completed within the next few months so that "the source of pollution to Berry's Creek may be finally abated." By January 25, 1965 the Department of Health had apparently not received any information about the laboratory studies which were to accompany final installation of the sewers and collecting sump and sought additional information about the progress of the project. Apparently the sewer and collecting sump were completed on January 15, 1965. Wood Ridge planned to have the laboratory studies complete by March, with the planned treatment facilities "on stream by July 1965." In June 1965, however, the health department had received no reports on the laboratory studies or the design of the waste treatment facilities. Even by March 31, 1966 no treatment plant had been designed, let alone completed, at the site.

By late 1969 or early 1970 the federal Environmental Protection Agency became involved in the company's waste problems. John Ciancia, Chief of the Industrial Waste Section of the Federal Water Quality Administration, visited the site and determined that it was discharging process waste containing mercury. On October 23, 1970 the company approved a capital expenditure for improved effluent treatment—a problem characterized by a company document as "cur-

rently at an emergency level." That document asserted that

> We are discharging mercury at a rate which we cannot measure precisely, but which has been estimated by the F.W.Q.A. [Federal Water Quality Administration] at 4.2 lbs./day (55 GPM total discharge, averaged over 24 hours, 7 PPM mercury content). The preliminary standard which the F.W.Q.A. appears to be accepting from other mercury users is a maximum of 0.5 lbs./day, which we definitely exceed. . . . Ventron has already suffered adverse publicity because of alleged mercury discharges, and we will certainly receive more if we do not institute controls approved by the F.W.Q.A. While the current furor over mercury pollution undoubtedly contains much exaggeration and misinformation, it is unquestionably a toxic substance, and as such we are under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes.

From subsequent correspondence between the federal agency and Ventron (by then, 1971, owner of the processing plant), we deduce that the parties were attempting to work out the details of a new treatment process to reduce the amount of mercury admittedly being deposited into Berry's Creek. Ventron never succeeded in preventing mercury contaminated effluent from reaching Berry's Creek. As noted, the processing plant tract was sold to the Wolfs in 1974 and their development of the property caused additional pollution problems which resulted in the suit filed by the DEP.

[266 *N.J. Super.* at 311-317, 629 A.2d at 901-904.]

Several aspects of the documentary record are noteworthy. The first State Department of Health report in 1956 noted that samples of wastes in Berk's settling tanks

contained virgin mercury as well as organic and inorganic mercury compounds, and that effluent from the settling tanks discharged into an open ditch and eventually into Berry's Creek. At that time, Department of Health engineers informed Berk officials that the effluent discharging from the plant into Berry's Creek was unacceptable because of the high suspended-solids content and a high biological-oxygen demand (B.O.D.). During a follow-up visit in 1958, a state engineer, responding to a Berk executive's account of efforts to expedite construction of a new settling tank, informed the executive that a settling tank would not itself reduce the B.O.D. to within acceptable limits, emphasizing that continued discharge of effluent into Berry's Creek could be allowed only if Berk implemented further treatment in accordance with plans approved by the State. Thus, Berk's executives were alerted to the risk that the high B.O.D. demand that characterized Berk's effluent threatened depletion of the oxygen content of Berry's Creek, which in turn would compromise the Creek's capacity to accommodate fish, plants, and other wildlife. Moreover, although the early Department of Health reports did not focus on the extent to which the solids in Berk's effluent included mercury, a March 1959 departmental memorandum reported a conversation with a Berk official indicating his awareness that whatever effluent treatment methodology was selected,

> the removal of the mercurial compounds will be a necessity. These are mainly in suspension and a large proportion of them are already removed by sedimentation, but many particles are too fine to permit removal by this means. Work is to be undertaken to determine if they can be successfully removed by a flocculation process.

By early 1960, Berk and its successor, Wood Ridge, knew that the local sewerage authority would not process the company's effluent, and represented to the State that

the company would construct its own treatment facility. As a temporary measure, the company was then discharging its untreated effluent into a lagoon that provided an additional two-days detention before the ultimate discharge into Berry's Creek. However, Wood Ridge took no action toward construction of a treatment facility until 1964, when it engaged a consulting engineering firm after state officials again complained about the company's failure to have submitted plans for the proposed treatment facility. The consulting engineers' report recommended the general design of Wood Ridge's new treatment facilities, set forth minimum effluent-quality standards, and contemplated abandonment of the waste-holding lagoon. Although Department of Health officials agreed generally with the report's proposals, Wood Ridge failed to complete the necessary laboratory studies and never filed final plans for the waste-treatment facility with state officials.

As noted, by 1970 the enforcement responsibility had shifted to the Federal Environmental Protection Agency (EPA), and the regulatory focus was then directed at the company's discharge of mercury into Berry's Creek. Whatever the company's prior awareness of mercury discharges may have been, by October 1970, the company could not fail to acknowledge that mercury "is unquestionably a toxic substance, and as such we are under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes." Subsequently, Wood Ridge did install waste-treatment facilities that diminished the volume of mercury-contaminated effluent. However, until the plant ceased operations in 1974, Wood Ridge was unable to reduce the daily volume of mercury discharged into Berry's Creek below the level considered to be tolerable by the EPA.

II

Issues of Insurance-Policy Interpretation

The Court is presented with a number of significant insurance-coverage issues. Cross-petitioners argue that we need not determine whether the property damage for which remediation was ordered in the Ventron litigation resulted from an "occurrence," because in their view environmental-remediation costs imposed at the instance of governmental-enforcement agencies do not constitute "damages" as that term is used in standard CGL policies. They also contend that those policies containing the standard pollution-exclusion clause afford no coverage to Morton and its predecessors because the discharges of pollutants from the mercury-processing plant into Berry's creek and the surrounding area were not "sudden and accidental." Morton argues that the record presents an issue of fact about whether the property damage requiring remediation was "intended or expected from the standpoint of the insured," asserting that the Chancery Division's grant of summary judgment on that issue was error. We also address the duty-to-defend questions raised by the Appellate Division's reversal of the judgment for Morton against General Accident for a portion of Morton's defense costs and counsel fees.

A. *"As Damages"*

In their joint cross-petition for certification, several of the insurance company defendants (supported by *amicus* Insurance Environmental Litigation Association) argue that aside from the question whether the discharges of pollutants by Morton's predecessors constitute covered "accidents" or "occurrences" under the various policies, the expenditures compelled by the judgment in the *Ventron* litigation do not constitute "damages" for which indemnification is payable under those policies. The Chancery Division, relying on *Broadwell Realty Services, Inc. v. Fi-*

delity & Casualty Co., 218 *N.J. Super.* 516, 525-30, 528 *A.*2d 76 (App. Div. 1987), held that the term "damages" encompassed the remediation expenses mandated in *Ventron*. The Appellate Division did not address the issue. Although some variation appears in the language of the policies, the typical provision, characterized by the Liberty Mutual CGL policy, supra at 11,629 A.2d at 836, states:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of * * * property damage to which this policy applies, caused by an occurrence * * *.
>
> [Emphasis added.]

The insurers argue that the critical phrase "as damages" confines their duty of indemnity to judgments for traditional tort-liability money damages, and imposes no obligation to reimburse Morton for equitable remedies such as governmentally-mandated response costs intended to remediate environmental harm. They note and rely on the observation by the trial court that

> [t]he State sought and received an Order for the cleanup of the land now owned by plaintiff. Money damages were not awarded to anyone by Judge Lester.

They also contend that the Spill Act, the primary statutory enactment on which defendants' liability in the *Ventron* litigation was based, distinguishes between "cleanup and removal costs," defined in *N.J.S.A.* 58:10-23.11b(d), and "damages," citing *N.J.S.A.* 58:10-23.11g(a). The essence of the insurers' argument, however, is that the undefined phrase "as damages" unambiguously is understood in the context of insurance coverage to have a technical but settled meaning, and refers only to traditional third-party compensatory awards rather than equitable-type relief in-

tended not to compensate claimants but to remediate environmental damage.

Morton, supported by *amici* State of New Jersey and New Jersey State League of Municipalities, argues that the policy term "as damages" encompasses the remediation costs imposed by the Ventron judgment. Morton preliminarily observes that the joint and several liability of the Ventron defendants was predicated both on the Spill Act and common-law nuisance principles, *Ventron, supra*, 94 *N.J.* at 493, 468 A.2d 150, asserting that at least the relief based on common-law principles is analogous to a traditional tort-law damages award. More generally, Morton argues that the undefined term "as damages" should not be construed technically but rather should be accorded its plain meaning in order to vindicate the objectively-reasonable expectations of insureds, who would assume that CGL policies would cover environmental-remediation costs as well as third-party liability claims.

In resolving those competing contentions, we are not required to write on a blank slate, numerous federal and state courts having preceded us in addressing the issue. Three Circuit Courts of Appeals, applying state law, have concluded that environmental-remediation costs are not covered damages under CGL policies. *See Grisham v. Commercial Union Ins. Co.*, 951 *F.*2d 872, 875 (8th Cir. 1991) (Arkansas law); *Parker Solvents Co. v. Royal Ins. Cos. of America*, 950 *F.*2d 571 (8th Cir. 1991) (Arkansas law); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 *F.*2d 66, 69 (1st Cir. 1991) (Maine law); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 *F.*2d 979, 981 (4th Cir. 1988) (South Carolina law); *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 *F.*2d 977, 985 (8th Cir.) (en banc) (Missouri law), *cert. denied*, 488 *U.S.* 821, 109 S. Ct. 66, 102 *L. Ed.* 2d 43 (1988) (NEPACCO); *Maryland Casualty Co. v. Armco, Inc.*, 822 *F.*2d 1348, 1352 (4th Cir. 1987) (Maryland law), *cert. denied*, 484 *U.S.* 1008, 108 S. Ct. 703, 98 *L. Ed.* 2d 654 (1988). A number of federal

district courts have reached the same conclusion. *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 *F. Supp.* 437, 450 (D. Kan. 1990) (Kansas law); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 *F. Supp.* 950, 953-55 (N.D. Ill. 1988) (Illinois law); *Hayes v. Maryland Casualty Co.*, 688 *F. Supp.* 1513, 1515 (N.D. Fla. 1988) (Florida law); *Travelers Ins. Co. v. Ross Elec.*, 685 *F. Supp.* 742, 744-45 (W.D. Wash. 1988) (Washington law). The Supreme Judicial Court of Maine has reached the same result. *See Patrons Oxford Mutual Ins. Co. v. Marois*, 573 *A.*2d 16, 18-19 (1990). The rationale for the viewpoint that "damages" does not include equitable relief such as payment of environmental-response costs is expressed plainly by the Eighth Circuit in *NEPACCO*, *supra*:

> Viewed outside the insurance context, the term "damages" is ambiguous: it is reasonably open to different constructions. Webster's Third New International Dictionary 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for wrong or injury caused by a violation of a legal right." The dictionary definition does not distinguish between legal damages and equitable monetary relief. *E.g., New Castle County v. Hartford Accident & Indemnity Co.*, [673 F.Supp. 1359] at 1366 [(D. Del. 1987)]. Thus, from the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses.
>
> In the insurance context, however, the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief. *See Maryland Casualty Co. v. Armco, Inc.*, 822 *F.*2d [1348] at 1352 [(4th Cir. 1987)]. The CGL policies require Continental to "pay on behalf of the insured all sums which the insured shall become

> legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence." (Emphasis added.) "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law." [*Aetna Casualty & Surety Co.*] *Hanna*, 224 *F.*2d [499] at 503 [(5th Cir. 1955)]. Although not defined in the CGL policies, "[t]he word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts."
>
> [842 *F.*2d at 985-86 (quoting *Maryland Casualty Co., v. Armco, Inc.*, 643 *F. Supp.* 430 at 432 (D. Md. 1986)).]

The clear weight of authority, however, among both federal and state courts adopts the view that the undefined term "damages" in CGL policies should be accorded its plain, non-technical meaning, thereby encompassing response costs imposed to remediate environmental damage. *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 *F.*2d 1507, 1513 (9th Cir. 1991) (applying Idaho law); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 *F.*2d 1023, 1030 (2d Cir. 1991) (applying Vermont law), *cert. denied*, ___ U.S. ___ , 112 *S. Ct.* 2939, 119 *L.Ed.* 2d 564 (1992); *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 944 *F.*2d 940, 947 (D.C. Cir. 1991) (applying Missouri law), *cert. denied sub nom. Certain Underwriters at Lloyds, London v. Independent Petrochemical Corp.*, ___ U.S. ___ , 112 *S. Ct.* 1777, 118 *L. Ed.* 2d 435 (1992); *New Castle County v. Hartford Accident & Indem. Co.*, 933 *F.*2d 1162, 1184-91 (3d Cir. 1991) (applying Delaware law), *on remand*, 778 *F. Supp.* 812 (D. Del. 1991), *rev'd on other grounds*, 970 *F.*2d 1267 (3d Cir. 1993), *cert. denied*, ___ U.S. ___ , 113 *S. Ct.* 1846, 123 *L. Ed.* 2d 470 (1993); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 *F.*2d 1200, 1207 (2d Cir.

1989) (applying New York law), *cert. denied*, 496 *U.S.* 906, 110 *S. Ct.* 2588, 110 *L.Ed.* 2d 269 (1990); *Township of Gloucester v. Maryland Casualty Co.*, 668 *F. Supp.* 394, 400 (D.N.J. 1987) (applying New Jersey law); *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 274 Cal.Rptr. 820, 834-45, 799 *P.*2d 1253, 1267-78 (1990); *Aerojet-General Corp. v. Superior Court*, 211, 209 *Cal.App.*3d 216, 257 *Cal. Rptr.* 621, 628 (1989); *A. Y. McDonald Indus. v. Insurance Co. of North America*, 475 *N.W.*2d 607, 615-22 (Iowa 1991); *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 407 Mass. 689, 555 *N.E.*2d 576, 582-84 (1990); *United States Aviex Co. v. Travelers Ins. Co.*, 125 *Mich. App.* 579, 336 *N.W.*2d 838, 842-43 (1983); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 *N.W.*2d 175, 179-84 (Minn. 1990); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 *N.C.* 133, 388 *S.E.*2d 557, 565-69 (1990); *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 *Wash.* 2d 869, 784 *P.*2d 507, 510-15 (1990); *Compass Ins. Co. v. Cravens, Dargen & Co.*, 748 *P.*2d 724, 729-30 (Wyo. 1988).

In adopting the view that "damages" includes environmental remediation costs, the Washington Supreme Court observed:

> These cases have found that cleanup costs are essentially compensatory damages for injury to property, even though these costs may be characterized as seeking "equitable relief." Or put another way, "coverage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder." In *United States Fidelity & Guar. Co.*, the court found that once property damage is found as a result of environmental contamination, cleanup costs should be recoverable as sums that the insured was liable to pay. According to an earlier case, *United states Aviex Co. v. Travelers Ins. Co.*, 125 *Mich.App.* 579, 589-90, 336 *N.W.*2d 838 (1983), the environmental cleanup costs are covered

because they are equivalent to "damages" under state law:

> If the state were to sue in court to recover in traditional "damages", including the state's costs incurred in cleaning up the contamination, for the injury to the ground water, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.
>
> [*Boeing, supra*, 784 P.2d at 511-12 (citations omitted).]

The Third Circuit, applying Delaware law, reached the same conclusion:

> The competing lines of cases relied upon by CNA and the County demonstrate that resolution of this issue turns on whether the word "damages" should be given its legal, technical meaning or its plain, ordinary meaning. Given the precepts of Delaware law and the absence of a definition limiting the meaning of "damages" in CNA's policies, we think that to state the question is virtually to answer it. In our view, the ordinary, usual meaning of "damages," which we are bound to apply under Delaware law unless the policy clearly directs us to another meaning, does not convey the limitations suggested by CNA. In short, we believe that the Delaware Supreme Court would find the *Avondale-Boeing-Spangler* line of cases to be the better reasoned. We thus conclude that the term "damages," in the context of a standard CGL policy,

should be interpreted broadly to encompass response costs and other equitable relief.

[*New Castle, supra*, 933 F.2d at 1188.]

Although this Court declined to address the issue in *New Jersey Department of Environmental Protection v. Signo Trading International, Inc.*, 130 *N.J.* 51, 67, 612 A.2d 932 (1992), Justice O'Hern, dissenting on other grounds, concluded that "environmental—response costs are covered damages under a CGL policy." *Id.* at 74, 612 A.2d 932. We find his analysis of the issue to be thoroughly persuasive:

> "Damages" means money to most people. Money is what DEP wants from Springer. One United States District Court in New Jersey has perhaps stated it best: In assessing what an insured would reasonably expect from a CGL policy, it reasoned that "[t]he average person would not engage in a complex comparison of legal and equitable remedies in order to define * * * 'damages', but would conclude based on the plain meaning of words that the cleanup costs imposed on [the insured] * * * would constitute an obligation to pay damages." *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994, 1988 WL 112142 at 3 (D.N.J. Oct. 14, 1988); *see also Avondale Indus., Inc. v. Travelers Indemn. Co.*, 697 *F. Supp.* 1314, 1319 (S.D.N.Y.1988) ("The average businessman does not differentiate between 'damages' and 'restitution;' in either case, money comes from his pocket and goes to third parties. * * * The average businessman would consider himself covered for cleanup expenditures applicable to others' properties."), *aff'd*, 887 *F.*2d 1200 (2d Cir.1989).
>
> [*Id.* at 75-76, 612 A.2d 932.]

We are fully in accord with the views expressed by Justice O'Hern in *Signo Trading* and adopted by the ma-

jority of federal and state courts that have addressed the issue. Accordingly, we hold that the environmental-response costs and remediation expenses imposed on Morton's predecessors in the *Ventron* litigation constitute sums that Morton will have to pay "as damages" because of property damage, within the meaning of the CGL policies at issue. Although the "owned-property" exclusion, which generally bars coverage for "property damage to property owned or occupied [by] or rented to the insured," is asserted as a defense by some insurers, we imply no view concerning the effect of that exclusion on the coverage issues before us, that issue not having been raised, briefed, or argued by the parties.

B. *The Pollution-Exclusion Clause*

We next address the arguments against coverage based on the so-called pollution-exclusion clause. Several insurers contend that irrespective of our conclusion about whether the property damage requiring remediation was caused by an "occurrence," no coverage exists under policies containing the standard pollution-exclusion clause, which, as noted above, *supra* at 11-12, 629 A.2d at 836, provides:

> This insurance does not apply * * * (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Although the record reveals that some of the excess carriers had issued policies with non-standard pollution-exclusion clauses, we confine our analysis to the standard clause, on which the extensive briefs of the parties and *amici* have also focused. To facilitate our discussion of the issues,

we first summarize our holding with respect to the interpretation that we shall apply to the standard pollution-exclusion clause, and then set forth in detail the factual and legal foundation for our conclusion.

We overrule the Appellate Division's decision in *Broadwell, supra,* to the extent that it holds that the standard pollution-exclusion clause should be understood merely to impose the same conditions on coverage as are imposed by the definition of "occurrence," which focuses on whether the ultimate damage was expected or intended from the standpoint of the insured. 218 *N.J. Super.* 516, 534-36, 528 A.2d 76. As is evident from the text of the standard clause, the phrase "sudden and accidental" does not characterize or relate to the *damage* caused by pollution but instead narrowly limits the kind of "discharge, dispersal, release or escape" of pollutants for which coverage is provided. Although the word "sudden" is hardly susceptible of precise definition, and is undefined in those CGL policies that include the standard pollution-exclusion clause, we are persuaded that "sudden" possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning, but the duration of the event—whether it lasts an instant, a week, or a month—is not necessarily relevant to whether the inception of the event is sudden. The meaning of the term "accidental" being generally understood, we discern that the phrase "sudden and accidental" in the standard pollution-exclusion clause describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and are unintended. If applied as written, although interpretative questions undoubtedly would require resolution, the clause sharply and dramatically would restrict the coverage that previously had been provided under CGL policies for property damage caused by accidental pollution, which included coverage for continuous or repeated exposure to conditions, provided that the property *damage*—not the discharge—was "neither expected nor intended

from the standpoint of the insured." We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading. Proffered to regulators merely as a clarification of existing coverage "so as to avoid any question of intent," and as a continuation of coverage for pollution-caused "injuries that result[] from an accident," the industry's understatement of the clause's actual effect on coverage for pollution damage is both apparent and unjustifiable. Although the insurers urge that we not consider the regulatory history of the standard clause without a fuller record, we are persuaded that a remand would be redundant, and that this record together with the reported cases that address the regulatory history and the abundant independent commentary on the subject affords an accurate and comprehensive basis for our determination.

The industry's presentation and characterization of the standard pollution-exclusion clause to state regulators constituted virtually the only opportunity for arms-length bargaining by interests adverse to the industry, insureds having virtually no choice at all but to purchase the industry-wide standard CGL policy. Accordingly, we deem appropriate construing the pollution-exclusion clause in a manner consistent with the objectively-reasonable expectations of the New Jersey and other state regulatory authorities, because only those regulatory authorities were presented with an opportunity to disapprove the clause. As presented, the regulatory authorities would not readily have understood that the pollution-exclusion clause eliminated *all* coverage for pollution-related claims except in cases of abrupt and accidental discharges. Rather than "clarify" the scope of coverage, the clause virtually eliminated pollution-caused property-damage coverage, without

any suggestion by the industry that the change in coverage was so sweeping or that rates should be reduced. For those reasons, we decline to enforce the standard pollution-exclusion clause as written. To do so would contravene this State's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause.

To the extent that an interpretation of the pollution-exclusion clause less sweeping than that required by its literal terms was fairly inferable from the industry's explanatory statements to regulators, we perceive that regulators would reasonably have understood the effect of the clause to have denied coverage for the intentional discharge, dispersal, release, or escape of known pollutants, whether or not the eventual damage was intended or expected from the standpoint of the insured. The industry's presentation of the clause to regulators described it as a clarification of the "intended and expected" clause of the basic "occurrence" definition "so as to avoid any question of intent," and could fairly be understood as an attempt to override the issue whether damage was intended by excluding coverage for intentional discharges of known pollutants. Accordingly, we construe and give effect to the standard pollution-exclusion clause only to the extent that it shall preclude coverage for pollution-caused property damage caused by an "occurrence" if the *insured* intentionally discharged, dispersed, released, or caused the escape of a known pollutant.

1. Adoption and Approval of the Standard Pollution-Exclusion Clause.

The background events that led the insurance industry to adopt the standard pollution-exclusion clause are well-documented and relatively uncontroverted. *See* Nancy Ballard and Peter Manus, *Clearing Muddy Waters: Anatomy*

of the Comprehensive General Liability Pollution Exclusion, 75 *Cornell L. Rev.* 610, 622-27 (1990); Robert Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, *18 Rutgers L.J.* 9, 31-38 (1986); Richard Hunter, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 *U. of Ill. L. Rev.* 897, 903-06; Thomas Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 *U. Cin. L. Rev.* 1165, 1187-1203 (1991); E. Joshua Rosenkranz, Note, *The Pollution Exclusion Through the Looking Glass*, 74 *Geo. L.J.* 1237, 1241-53 (1986). A number of courts have also reviewed the events leading to the adoption of the pollution-exclusion clause. *See New Castle County, supra*, 933 *F.*2d at 1196-98; *Broadwell, supra*, 218 *N.J. Super.* at 532-34; *Just v. Land Reclamation Ltd.*, 155 *Wis.* 2d 737, 456 *N.W.*2d 570, 573-75 (Wis. 1990).

As both the cases and commentators acknowledge, CGL policies prior to 1966 afforded liability coverage for bodily injury and property damage "caused by accident," the term "accident" being undefined in the standard policy. Courts generally construed the term "accident" to encompass ongoing events that inflicted injury over an extended period provided that the injury was unexpected and unintended from the insured's standpoint. *See, e.g., Anchor Casualty Co. v. McCaleb*, 178 *F.*2d 322 (5th Cir. 1949) (imposing coverage for damage to adjacent properties from oil flow over two-day period); *Employers Ins. Co. v. Rives*, 264 *Ala.* 310, 87 *So.*2d 653 (1955) (holding property damage from gradual leakage of gasoline into well covered as accident), *on remand*, 38 Ala. App. 411, 87 *So.* 2d 646, *cert. denied*, 264 Ala. 696, 87 *So.* 2d 658 (1956); *McGroarty v. Great Am. Ins. Co.*, 36 *N.Y.*2d 358, 368 *N.Y.S.*2d 485, 329 *N.E.*2d 172 (1975) (imposing liability for damage caused by excavation and construction on adjacent property over several months); Ballard & Manus, *supra*, 75 *Cornell L. Rev.* at 623-24; Reiter et al., *supra*, 59 *U. Cin. L. Rev.* at 1187-88; Rosenkranz, *supra* 74 *Geo. L.J.* at 1241-46.

In 1966 the insurance industry revised its standard-form CGL policy to afford coverage based on an "occurrence," which the policy defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured." Ballard & Manus, *supra*, 75 *Cornell L. Rev.* at 624; Reiter et al., *supra*, 59 *U. Cin. L. Rev.* at 1190. (The 1973 version of the standard CGL policy promulgated by the ISO re-defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Robert Tyler, Jr. and Todd Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 *Idaho L. Rev.* 497, 499 (1981)). The 1966 revision of the CGL policy was generally understood "to cover pollution liability that arose from gradual losses," Rosenkranz, *supra*, 74 *Geo. L.J.* at 1247, and was acknowledged as having been "intended to broaden coverage * * * by avoiding an implication that there was no coverage for a continuing condition as distinguished from a sudden event." Robert Keeton, *Basic Text on Insurance Law*, § 5.4c, at 300 (1971). Those courts that have attempted to trace the events leading to adoption of the pollution-exclusion clause confirm the uniform understanding of the broadened coverage afforded under the 1966 revision of the CGL policy. *See e.g., New Castle County, supra*, 933 *F.*2d at 1197 ("The standard, occurrence-based policy thus covered property damage resulting from gradual pollution. So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants."); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 *Ill. App.* 3d 378, 129 Ill.Dec. 306, 312, 535 *N.E.*2d 1071, 1077, (Ct.) ("Prior to the insertion of the pollution-exclu-

sion in the 1970s, 'occurrence-based' coverage embraced not only the usual accident, but also exposure to conditions which continued for an unmeasured period of time."), *appeal denied*, 127 Ill.2d 643, 136 Ill.Dec. 609, 545 *N.E.*2d 133 (1989); *see also* Chesler et al., *supra*, 18 *Rutgers L.J.* at 31 ("[T]he inclusion of 'injurious exposure to conditions' as part of the definition of accident indicated that injury resulting from a continuing process was covered under the policy."); Reiter et al., *supra*, 59 *U. Cin. L. Rev.* at 1191 ("Indeed, gradual pollution was a paradigm example of what *was* a covered 'occurrence,' a feature of the CGL policy that the insurance industry aggressively marketed and routinely emphasized.").

Foreseeing an impending increase in claims for environmentally-related losses, and cognizant of the broadened coverage for pollution damage provided by the occurrence-based, CGL policy, the insurance industry drafting organizations began in 1970 the process of drafting and securing regulatory approval for the standard pollution-exclusion clause. "The insurer's primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations." Rosenkranz, *supra*, 74 *Geo. L.J.* at 1251. Commentators attribute the insurance industry's increased concern about pollution claims to environmental catastrophes that occurred during the 1960s. "Pollution claims burst on the insurance scene following the Torrey Canyon disaster and the Santa Barbara off-shore drilling oil spills in 1969." Hourihan, *Insurance Coverage for Environmental Damage Claims, 15 Forum* 551, 533 (1980). Other commentators observe that the insurance industry, concerned about public reaction to environmental pollution, desired to clarify and publicize its position that CGL policies did not indemnify knowing polluters. Reiter et al., *supra*, 59 *U. Cin. L. Rev.* at 1195-56. Consistent with that objective, the President of INA announced his company's intention

to adopt the pollution-exclusion endorsement with these comments:

> INA will continue to cover pollution which results from an accidental discharge of effluents—the sort of thing that can occur when equipment breaks down.
>
> We will no longer insure the company which knowingly dumps its wastes. In our opinion, such repeated actions—especially in violation of specific laws—are not insurable exposures. Moreover, we are inclined to think that any attempt to provide such insurance might well be contrary to public policy. We at INA hope that our anti-pollution exclusion may help encourage many companies to take the first, crucial steps toward improving their manufacturing processes—the steps that will lead eventually to a cleaner, healthier and, we hope, happier life for all.
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> [Charles K. Cox, *Liability Insurance in the Era of the Consumer*, Address Before the Annual Conference of the American Society of Insurance Management (Apr. 9, 1970), *quoted* in Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 *Forum* 762, 767 (1976).]

Whatever may have been the industry's motivation, the General Liability Governing Committee of the Insurance Rating Board (IRB) (successor to the National Bureau of Casualty Underwriters) authorized its drafting committee

> to consider the question and determine the propriety of an exclusion, having in mind that pollutant-caused injuries were envisioned to some extent in the adoption of the current "occurrence" basis of coverage, and some protection is afforded by way of the definition of this term.
>
> [Reiter et al., 59 *U. Cin. L. Rev.* at 1197 (footnote omitted).]

The end-product of the IRB's drafting effort was the standard pollution-exclusion clause, *supra* at 629 A.2d 836, which became known as exclusion "f" of the standard form CGL policy. According to one member of the drafting committee, the pollution-exclusion clause allowed the underwriters "to perform their traditional function as insurers of the unexpected event or happening and yet * * * [did] not allow an insured to seek protection from his liability insurers if he knowingly polluted." Francis X. Bruton, *Historical Liability and Insurance Aspects of Pollution Claims, Proceedings of Insurance, Negligence and Compensation Law Section, ABA*, 1971, at 311, *quoted* in Soderstrom, *supra*, 11 *Forum* at 768. Other commentators have expressed similar conclusions about the central purpose of the pollution-exclusion clause. *See, e.g.*, Soderstrom, *supra*, 11 *Forum* at 767 ("By the use of the pollution-exclusion endorsement * * * [c]overage for willful, intentional or expected violations was to be excluded."); S. Hollis M. Greenlaw, *The CGL Policy to the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 *Colum. J.L. & Soc. Probs.* 233, 246 (1990) ("Yet although the language of the pollution-exclusion clause is ambiguous, intra industry statements made contemporaneously with the drafting of the clause and representations made by the industry to various state insurance commissioners * * * reveal that the industry clearly intended to preclude coverage of the *reckless* polluter as well as the *intentional* polluter."). The New York State legislature apparently shared that view of the pollution-exclusion clause's purpose, enacting in 1971 a statute requiring policies issued to commercial or industrial enterprises to include the standard form pollution-exclusion clause, *N.Y. Ins. Law* § 46(13)-(14) (McKinney 1972), and offering this explanation for its adoption:

> For example, a polluting corporation might continue to pollute the environment if it could buy protection from potential liability for only the small cost of an

> annual insurance premium, whereas, it might stop polluting, if it had to risk bearing itself the full penalty for violating the law.
>
> [*New York Legis. Ann.* 353-54 (1971).]

As a New York appellate court explained, "The conclusion thus becomes compelling that the pollution exclusion clause, mandated by statute, was intended to apply only to actual polluters." *Niagara County v. Utica Mut. Ins. Co.*, 80 *A.D.*2d 415, 439 *N.Y.S.*2d 538, 540 (1981).

After industry approval, the IRB and the Mutual Insurance Rating Bureau (MIRB) sought state regulatory approval to add the pollution-exclusion clause as an endorsement to standard CGL policies, apparently submitting to most if not all states in which approval was sought a standard explanatory memorandum that read in part as follows:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * *.
>
> [*Reprinted in* Ballard and Manus, *supra*, 75 *Cornell L. Rev.* at 625-26.]

As the record indicates, the identical explanatory memorandum was filed by the IRB with the New Jersey Department of Insurance in May 1970. The Attorney General's *amicus* brief observes that the industry's submission of the pollution-exclusion clause and its approval by the Department of Insurance were specifically required by New Jersey's statutory provisions regulating rates for

insurance coverage, *N.J.S.A.* 17:29A-1 to -28, although no rate change was sought with respect to the pollution-exclusion clause. We take note of other provisions of the insurance statutes that require approval of commercial-insurance policy provisions in order to prevent the issuance of policy forms that are inequitable or misleading. *See N.J.S.A.* 17:29AA-11. We assume that most states had in effect comparable regulatory provisions that mandated the submission of the pollution-exclusion clause for state approval.

In considering the IRB's explanatory memorandum concerning the effect of the pollution-exclusion clause—which the record suggests was the only explanation offered to New Jersey insurance officials—we accord special significance to the process by which that clause gained approval in New Jersey and other states. Realistically, once the clause gained regulatory approval, it was uniformly adopted as an endorsement to the standard-form CGL policies that were issued to innumerable commercial enterprises and governmental agencies for more than a decade. The abundant case law called to our attention by counsel for all parties may be regarded merely as an illustrative sample of the virtually universal inclusion of the standard clause, or one of its derivatives, in CGL policies issued throughout the United States. Of course, after regulatory approval the specific provisions of the pollution-exclusion clause ordinarily were not negotiable by purchasers of CGL policies. As some commentators observe, the typical commercial insured rarely sees the policy form until after the premium has been paid. Ballard and Manus, *supra*, 75 *Cornell L. Rev.* at 621; W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 *S. Cal. L. Rev.* 1, 12 (1974). Accordingly, to the extent that the pollution-exclusion clause ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities.

In considering the accuracy of the IRB's explanatory memorandum, we note that the insurance companies in this litigation, and in general, assert the position that the pollution-exclusion clause precludes coverage for all pollution damage, whether or not intended, unless the *discharge* of pollutants was "sudden" (meaning abrupt) and "accidental," or a so-called "boom" event. That being the industry's understanding of the effect of the pollution-exclusion clause, the first two sentences of the explanatory memorandum to state regulators are, to say the least, paradigms of understatement:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent.

The first sentence is simply untrue. As discussed, *supra* at 32-33, 629 A.2d at 849-850, the 1966 version of the CGL policy covered property damage from gradual pollution and imposed no restriction on the "suddenness" of the pollutant discharge. We repeat the Third Circuit's observation in *New Castle, supra:*

> The standard, occurrence-based policy thus covered property damage resulting from gradual pollution. So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants.
>
> [933 F.2d at 1197.]

For that matter, the appendix filed by the Attorney General contains the MIRB's Explanatory Memorandum of Changes submitted to the New Jersey Department of Banking & Insurance in support of the 1966 revision of the CGL policy. That memorandum stated:

> Coverage has been broadened to an "occurrence" basis which is defined in the jacket. The definition reinforces the intent that the injury be fortuitous from the insured's standpoint and *by the addition of coverage for "injurious exposure to conditions" eliminates the connotation of suddenness previously intended as respects coverage on an "accident" basis.*
>
> [Emphasis added.]

In the context of the generally-recognized broad coverage afforded by the pre-existing "occurrence" policies for property damage caused by pollution, the industry's statement that "such coverage is not provided in most cases under present policies" is not only astonishing but inaccurate and misleading as well. As is widely acknowledged, even by commentators sympathetic to the insurers' position, the industry's primary concern in 1970 was that the occurrence-based policies "seemed tailor made to extend coverage to most pollution situations." Rosenkranz, *supra,* 74 *Geo. L.J.* at 1251. *See supra* at 33-35, 629 A.2d at 849-851.

The second sentence is even more misleading than the first. It states that "[t]he above exclusion clarifies this situation so as to avoid any question of intent," undoubtedly referring back to the immediately preceding clause that reads "because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence." Undeniably, the pollution-exclusion clause does "avoid any question of intent" because the clause excludes *all* coverage for unintentional pollution damage except for that caused by sudden and accidental discharges. But to characterize so monumental a reduction in coverage as one that "clarifies this situation" simply is indefensible. Stated accurately, the pollution-exclusion clause, as construed today by the industry, eliminates *all* coverage for unintended pollution-caused damage that the

occurrence-based policy had provided, except for the unusual "boom-event" type case in which the *discharge* of the pollutants was both sudden—meaning abrupt—and accidental. To describe a reduction in coverage of that magnitude as a "clarification" not only is misleading, but comes perilously close to deception. Moreover, had the industry acknowledged the true scope of the proposed reduction in coverage, regulators would have been obligated to consider imposing a correlative reduction in rates.

The succeeding sentence of the explanatory memorandum continued to camouflage the literal effect of the pollution-exclusion clause: "Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * * ." In asserting that coverage for pollution-caused injuries is "continued," the statement does not alert regulators to the critical change effected by the clause: under the occurrence-based policy, coverage was afforded if the *property damage* was accidental; under the pollution-exclusion clause, even if the property damage is accidental, no coverage is afforded unless the *discharge of pollutants* is both sudden and accidental. The memorandum utterly obscures that distinction, and the conclusion is virtually inescapable that the memorandum's lack of clarity was deliberate.

Supplemental explanations submitted by the IRB to state regulatory agencies were similarly lacking in candor. As noted by a Georgia federal court, the IRB informed the Georgia Insurance Department by letter of June 10, 1970, that

> "the impact of the [pollution exclusion clause] on the vast majority of risks would be no change. It is rather a situation of clarification * * * . Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued [except for the risks described in the filing]."

[*Claussen v. Aetna Casualty & Sur. Co.*, 676 *F. Supp.* 1571, 1573 (S.D. Ga. 1987) (quoting letter from R. Stanley Smith, Manager of the Insurance Rating Board, to the Georgia Insurance Department, June 10, 1970), *question certified by* 865 *F.*2d 1217 (11th Cir.), certified *question answered by* 259 Ga. 333, 380 *S.E.*2d 686, *answer to certified question conformed to* 888 *F.*2d 747 (11th Cir. 1989), *on remand*, 754 *F. Supp.* 1576 (S.D. Ga. 1990).]

That letter prompted the Court to observe:

> The Court does not wish to condone the conduct of the insurance industry that plaintiff has exposed. The statements made by the Insurance Rating Board to the Georgia Insurance Department, if not fraudulent, certainly were not straightforward. The Rating Board downplayed the substantial effect the pollution exclusion clause would have on existing coverage in an effort to obtain approval for the clause's insertion into insurance policies.
>
> [*Ibid.*]

Similarly, in the course of regulatory proceedings before the West Virginia Commissioner of Insurance, the MIRB submitted a supplemental memorandum to explain the purpose of the exclusion: "This endorsement is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended." George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 *Ind. L. Rev.* 117, 154 (1988). In reliance on the industry's submissions, the West Virginia Insurance Commissioner approved the pollution-exclusion in a written order that stated in part:

> The said companies and rating organizations have represented to the Insurance Commissioner, orally and

> in writing, that the proposed exclusions * * * are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached;
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions[.]
>
> [*Reprinted in Joy Technologies v. Liberty Mut. Ins. Co.*, [187 *W.Va.* 742], 421 *S.E.*2d 493, 499 (1992).]

Insurance departments in at least two other states expressed concern over the industry's submission of the pollution-exclusion clause. In June 1970, the Kansas Commissioner of Insurance addressed several questions to the IRB. One question reflected the Commissioner's assumption that the current definition of occurrence provided coverage for property damage caused by pollution. He wrote: "It appears that the General-Automobile Liability policy now provides coverage for contamination and pollution. Please confirm." The IRB's response to the Commissioner's inquiry was inaccurate and misleading. It tracked the language of the explanatory memorandum submitted to state regulators, and did not attempt to explain or to disclose the full intended impact of the pollution-exclusion clause:

> It is our opinion that coverage for pollution or contamination is not provided under the present General-Automobile Liability policy because the damages can be said to be expected or intended, and thus are excluded by the definition of occurrence. It should be noted that the proposed endorsements will definitely clarify the situation.

The Insurance Commissioner of Puerto Rico apparently disapproved the pollution-exclusion clause when it initially

was filed, prompting a supplemental letter from the IRB to the Commissioner. The IRB's letter sheds no light whatsoever on the restriction of coverage that the industry intended to achieve through the pollution-exclusion clause:

> We certainly appreciate that where an insured acts in violation of the law, the policy does not provide coverage for the consequences of such acts. The exclusion is not aimed at taking care of such a situation. Rather, it is designed to clarify the policy as respects other situations where questions of intent might arise. Such questions usually arise when, with respect to a particular situation, the policy does not clearly spell out what is and is not covered in terms clearly understood by the insured or his representative. Relying solely upon the policy definition of occurrence which requires that the act causing damage must not be expected nor intended by the insured, might well cause dispute as to whether in fact the act was unexpected or unintended particularly in a fact situation involving a continuous course of action. This kind of situation is often very costly to both insureds and companies since many of them are brought into court to be resolved. All too often, the courts have been deciding such questions in favor of insureds, while strongly criticizing companies for not clearly spelling out intent in the policy. The courts are insisting that policies should clearly set forth intent. When, in the courts opinion, the policy does not, companies usually end up paying out large sums of money for damages resulting from situations wherein no coverage was ever intended and for which no premium was ever charged. Under such circumstances, we strongly believe that it is both necessary and desirable to clarify as many situations as possible so as to avoid any question of intent. This is precisely what our Contamination or Pollution Exclusion is designed to do.

As noted, the response to the Insurance Commissioner of Puerto Rico contains no disclosure about how the specific wording of the pollution-exclusion clause would operate to reduce substantially coverage that previously had been provided for pollution occurring over a sustained period. The conclusion is inescapable that the IRB intentionally avoided any discussion that would illuminate the magnitude of the intended restriction in coverage.

Because of the regulatory history leading to approval by the various state regulatory authorities, a number of State Attorneys General, including the New Jersey Attorney General in the *amicus* brief filed with this Court, have urged that the pollution-exclusion clause be interpreted in a manner consistent with the industry's representations to regulatory authorities in 1970. *See, e.g.*, Brief of *Amici Curiae* State of Delaware and Commonwealth of Pennsylvania, *New Castle County, supra*, 933 F.2d 1162; Brief of *Amicus Curiae* Insurance Commissioner of West Virginia, *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W.Va. 580, 390 *S.E.*2d 562 (1990); Memorandum of *Amicus Curiae* State of Indiana, in Support of Plaintiff's Motion for Partial Summary Judgment, *Ulrich Chem., Inc. v. American States Ins. Co.* 1990 WL 484974 (Ind. Cir. Ct. 1990) (No. 73C 01-8901-CP 016). Although the interests of states in insurance-coverage litigation are generally consistent with the interests of insureds, the assertion by several State Attorneys General of estoppel-type arguments, based on a generalized recognition that the industry's presentation of the pollution-exclusion clause to regulators was misleading, strongly suggests that the issue warrants careful and comprehensive consideration.

Responding to assertions that the IRB's representations to state regulators concerning the effect of the pollution-exclusion clause were misleading, *amicus curiae* Aetna Casualty & Surety Co. (Aetna) argues that "regulatory history" should not be confused with "drafting history." Referring to an affidavit submitted in the *New Castle* lit-

igation by one of the drafters of the pollution-exclusion clause, Aetna contends that the intent of the drafters of the clause was to restrict pollution coverage to the classical "accident" or "boom" event, and to exclude coverage for gradual pollution. That argument was addressed directly in deposition testimony by Richard E. Stewart, Superintendent of the New York State Department of Insurance from January 1967 to December 1970 and President of the National Association of Insurance Commissioners, 1970-71 (testifying in *J.T. Baker, Inc. v. Aetna Casualty & Surety Co.*, No. CV-4794-SSB (D.N.J. 1990)):

> "[T]he drafting documents, *the internal documents,* speak of sudden in its temporal sense, and as accomplishing a serious cutback in coverage. Granted. I am not questioning the accuracy of anything in Mr. Bruton's affidavit as to what was going on. *The filings with the states are completely inconsistent with that. And * * * do not disclose it, do not develop it, and in fact affirmatively maintain that we're just dealing with a clarification of the occurrence definition.*
>
> *Now, to me, and I think to other insurance people, what goes in a state filing is of much greater probative power than what is in an internal and unreleased series of memoranda. And since the—the internal communications, the drafting history documents that use temporal were not communicated outside the company bureau world, either to insureds and brokers, but only the filing documents and something like the Aetna bulletins to the field were communicated, but the filing documents are the ones that really matter, and they to me, in terms of what* [a] *company should be held to, contain the version of this ambiguous term which the industry should be held to. It's as simple as that, and I think it's a very straightforward answer * * * .*"

> [Deposition Testimony of Richard Stewart, *quoted in* Robert Sayler, *The Emperor's Newest Clothes, Revisionism and Retreat: The Insurer's Last Word on the Pollution Exclusion, 5 Mealey's Litig. Reps., Insurance* at 27, 46 (1991).]

2. Judicial Treatment of the Pollution-Exclusion Clause.

The abundance of federal- and state-court decisions addressing the pollution-exclusion clause confirms that an enormous outpouring of judicial energy already has been expended in attempting to fathom how this exclusion should be interpreted. Although categorizing the various judicial approaches may appear superficially to be helpful, caution is essential because the factual circumstances often diminish the significance of a court's ruling. A Florida federal judge made the point colorfully:

> This court recognizes that there is a plethora of authority from jurisdictions throughout the United States which, depending on the facts presented and the allegations of the underlying complaints, go "both ways" on the issues presented today. The cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.
>
> [*Pepper's Steel & Alloys v. United States Fidelity & Guar. Co.*, 668 *F. Supp.* 1541, 1549-50 (S.D. Fla. 1987).]

Nevertheless, the divergent judicial approaches to the issue inform our own evaluation concerning the manner in which the pollution-exclusion clause should be construed.

We first survey the New Jersey decisions. Next, we review the extensive federal and state case law that has construed "sudden" to have a temporal meaning or has

concluded that coverage under the pollution-exclusion clause is not provided for discharges of pollutants over a sustained period. Finally, we consider the substantial number of federal and state decisions that construe "sudden" to have a non-temporal meaning or that determine "sudden and accidental" to be ambiguous and to be construed against the insurer.

a. *New Jersey Case Law.*

The earliest New Jersey case to address the pollution-exclusion clause was *Lansco, Inc. v. Department of Environmental Protection*, 138 *N.J. Super.* 275, 350 *A.*2d 520 (Law Div. 1975), *aff'd o.b.*, 145 *N.J. Super.* 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 *N.J.* 57, 372 A.2d 322 (1977), in which the insured sought declaratory relief to establish coverage under a CGL policy for the cost of cleaning up an oil spill. Apparently, vandals had opened the valves on oil storage tanks causing some 14,000 gallons of oil to leak from the tanks into the Hackensack River. The carrier resisted coverage for the cost of cleanup, relying on the pollution-exclusion clause. The Chancery Division held, however, that the term "sudden" meant "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for," and that because the oil spill had been neither expected nor intended by Lansco, it qualified as a sudden and accidental discharge, thereby qualifying for coverage. 138 *N.J. Super.* at 282 350 A.2d 520.

Seven years later, in *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 *N.J. Super.* 156, 451 *A.*2d 990 (Law Div. 1982), a local utility authority instituted suit to compel its carriers to defend and indemnify it from claims asserted by residents that the Authority negligently operated its landfill, causing pollutants to seep into a nearby aquifer and contaminate the water supply. The carriers disclaimed coverage, citing the pollution-exclusion clause. The Law Division, relying

on out-of-state cases, concluded that the clause was ambiguous and that it could be "interpreted as simply a restatement of the definition of "occurrence"—that is, that the policy will cover claims where the injury was "neither expected nor intended." *Id.* at 164, 451 A.2d 990. Observing that the clause intended to bar coverage for the knowing polluter, the court determined that the Authority "never expected or intended that the waste would seep into the aquifer resulting in damage and injury to others." *Ibid.* Accordingly, the court ordered the carriers to provide a defense, reserving decision on their duty to indemnify. *Id.* at 165-66, 451 A.2d 990. Similarly, in *CPS Chemical Co. v. Continental Insurance Co.*, 199 *N.J. Super.* 558, 489 *A.*2d 1265 (Law Div. 1984), *rev'd on other grounds*, 203 *N.J. Super.* 15, 495 *A.*2d 886 (App. Div. 1985), the plaintiff instituted suit to compel a defense to an action instituted by the City of Philadelphia, alleging that the plaintiff's waste hauler had removed hazardous waste from its premises and, without the plaintiff's knowledge, had dumped the waste without authorization in a Philadelphia garbage dump. The carriers disclaimed coverage, relying in part on the pollution-exclusion clause. The Law Division, citing *Jackson Township, supra*, 186 *N.J. Super.* at 164, 451 A.2d 990, observed that the clause had been construed simply as a restatement of the definition of "occurrence." *CPS Chemical, supra*, 199 *N.J. Super.* at 569, 489 A.2d 1265. Concluding that the clause was ambiguous, the court construed the terms "sudden and accidental" as including unexpected and unintended events, and ordered the carriers to provide a defense. *Ibid.*

By far the most widely-cited New Jersey decision is *Broadwell, supra*, 218 *N.J. Super.* 516, 528 A.2d 76, involving a claim for damages against a carrier that refused to indemnify the insured for the costs of remediating a gasoline leak that was migrating into telephone-company cable vaults located underground on adjacent property. The carrier denied liability, contending that the pollution-ex-

clusion clause restricted coverage to damage caused by an "unexpected and instantaneous catastrophe." *Id.* at 530, 528 A.2d 76. Tracing the history of the adoption of the clause, the Appellate Division observed that its purpose was to encourage industry to improve its manufacturing and disposal practices, imposing a bar to coverage for pollution damage resulting from "knowing" pollution of the environment. *Id.* at 533, 528 A.2d 76. The court determined that the coverage provided by the pollution-exclusion clause was intended to be coextensive with the coverage provided by the definition of occurrence, *ibid.*, observing that any ambiguity and confusion inherent in the drafting of the clause should be resolved against the insurer. *Id.* at 536, 528 A.2d 76. It construed the term "sudden" to mean unexpected and unintended, without resolving whether the focus of the exclusion clause was on the discharge of pollutants or the damage to the environment. *Id.* at 535, 528 A.2d 76. Because it concluded that the record presented a factual issue on whether Broadwell had expected or intended environmental damage, the court reversed the Law Division's grant of summary judgment.

b. ***Cases Holding That "Sudden" has a "Temporal" Meaning or, Alternatively, That Discharges of Pollutants Over a Sustained Period are not "Sudden."***

Our discussion of federal and out-of-state cases construing the pollution-exclusion clause is necessarily extensive, in view of the remarkable number of reported decisions within the last decade or so. In addition, we perceive that so significant a connection exists between the decisions and the factual context in which the issue is posed that we have supplemented our citation of authorities with brief summaries of both the holdings and the factual settings, in order that the apparent divergence in judicial treatment of the pollution-exclusion clause may be better understood.

A significant number of federal and state courts, without adverting to the regulatory history or the background of the pollution-exclusion clause, have held that the clause excludes coverage for property damage resulting from the discharge of pollutants over a sustained period, although in several such cases the polluting activity was so flagrant that coverage might have been denied on the basis that the damage was not unexpected or unintended. Those courts bar coverage either on the basis that "sudden" has a temporal connotation, meaning abrupt or instantaneous, or else conclude simply that discharges of pollutants over an extended period cannot be deemed "sudden and accidental," without defining precisely the limits of those terms. A number of federal courts of appeal, applying state law, have adopted that approach. *See Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 968 *F.*2d 707, 710-11 (8th Cir. 1992) (holding that because "accidental" means "unexpected," "sudden" would be redundant if not held to mean abrupt, and hence damage caused by discharges over several months of 300,000 gallons of bilge water by insured's waste hauler at city landfill and discharges of toxic wastes from trucks and deteriorating tanks at haulers disposal site were barred from coverage by pollution-exclusion clause); *Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co.*, 962 *F.*2d 1484, 1487-92 (1992) (holding that "sudden" has temporal element suggesting immediacy, abruptness, and quickness, and barring coverage under pollution-exclusion clause for environmental damage caused by regular, intentional discharges over fifteen years of liquid wastes containing PCBs even though insured was unaware that wastes included PCBs), *cert. denied sub nom. El Paso Natural Gas Co. v. Hartford Accident & Indem. Co.*, ___ U.S. ___, 113 *S. Ct.* 411, 121 *L. Ed.* 2d 335 (1992); *Northern Ins. Co. v. Aardvark Assocs.*, 942 *F.*2d 189, 193-95 (3d Cir. 1991) (applying Pennsylvania law, concluding that "sudden and accidental" describes unexpected discharges that are abrupt and last

short time, and barring coverage for property damage caused by waste hauler's discharges of hazardous waste at disposal sites over several years); *Lumbermens Mut. Ins. Co. v. Belleville Indus., Inc.*, 938 *F.*2d 1423, 1425, 1427 (1st Cir. 1991) (applying Massachusetts law, construing "sudden" to mean abrupt, and holding that where insured engaged in continuous, long-term discharge of known pollutants, coverage was not provided for isolated instances in which rainstorm and fire had caused specific discharges of pollutants), *cert. denied*, ___ *U.S.* ___, 112 *S. Ct.* 969, 117 *L. Ed.* 2d 134 (1992); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 *F.*2d 66, 72-76 (1st Cir. 1991) (applying Maine law, construing "sudden" to mean temporally abrupt, and holding that pollution-exclusion clause bars coverage for insured's share of cleanup cost at waste-disposal facility that received hazardous-waste shipments from insured and others over thirteen years; record demonstrated that contamination of disposal site and adjacent property had occurred over extended period and not because of "sudden and accidental" discharges); *Ogden Corp. v. Travelers Indem. Co.*, 924 *F.*2d 39, 42-43 (2d Cir. 1991) (applying New York law, construing "sudden" to describe discharges occurring over short period of time, and holding pollution-exclusion clause bars carrier's obligation to defend or indemnify insured in underlying litigation alleging that insured had engaged in continuous discharge of pollutants over period of thirty-three years); *Grant-Southern Iron & Metal Co. v. CNA Ins. Co.*, 905 *F.*2d 954, 956-58 (6th Cir. 1990) (applying Michigan law, construing pollution-exclusion clause as barring coverage for continuous or ongoing occurrences of pollution, but reversing summary judgment for insurer and remanding for factual determination of whether polluting events had been accidental and short in duration); *EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co.*, 905 *F.*2d 8, 10-11 (2d Cir. 1990) (holding that pollution-exclusion clause barred insurer's duty to provide coverage in underlying litigation that alleged insured

willfully had discharged radioactive substances into environment over six-year period); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 *F.*2d 214, 219-20 (6th Cir.) (determining that under Michigan law sudden and accidental event occurs quickly, without warning and unintentionally, and holding that pollution-exclusion clause barred insured's claim for reimbursement of assessed cost of cleanup of industrial-waste site in absence of proof that damage had been caused by sudden and accidental discharges of hazardous waste), *cert denied*, 498 *U.S.* 911, 111 *S. Ct.* 284, 112 *L. Ed.* 2d 238 (1990); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 *F.*2d 31, 34-35 (6th Cir. 1988) (applying Kentucky law to define "sudden" by reference to temporal element that includes immediate and unexpected, and holding that property damage caused by regular and continuing discharges of coal dust over seven to eight years for which Kentucky air-pollution authorities had issued series of citations did not qualify for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Great Lakes Container Corp. v. National Union Fire Ins.*, 727 *F.*2d 30, 33-34 (1st Cir. 1984) (applying New Hampshire law and holding that regular and continuous discharge of hazardous waste in ordinary course of drum- and barrel-reconditioning business was neither "occurrence" nor sudden and accidental discharge of pollutants under CGL policy).

Numerous federal district court decisions reflect a similar approach to the interpretation of the pollution-exclusion clause. *See Anaconda Minerals Co. v. Stoller Chem. Inc.*, 773 *F. Supp.* 1498, 1505-06 (D. Utah 1991) (applying Utah law as defining "sudden" to mean abrupt or instantaneous, and holding property damage caused by intentional discharges of thousands of tons of flue dust containing hazardous materials and discharges of other hazardous waste stored in drums and above-ground tanks ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *United States Fidel-*

ity & Guar. Co. v. Morrison Grain Co., supra, 734 *F. Supp.* at 446-49 (applying Kansas law to define "sudden" as combining elements of quickness and without warning, and holding that property damage caused by deteriorating drums containing chemicals and pesticides improperly stored at one site and improperly buried at second site ineligible for coverage under pollution-exclusion clause, notwithstanding insured's lack of subjective knowledge that management of enterprise operated as joint venture improperly had disposed of hazardous waste); *Ray Indus., Inc. v. Liberty Mut. Ins. Co.,* 728 *F. Supp.* 1310, 1319 (E.D. Mich. 1989) (applying Michigan law as construing "sudden and accidental" exception not to apply when discharges occurred regularly or continuously in course of insured's business, and holding property damage caused in part by insured's regular and continuous practice over thirteen years of depositing contaminated barrels and drums containing hazardous waste in landfill ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd in part, rev'd in part,* 974 *F.*2d 754 (6th Cir. 1992); *Federal Ins. Co. v. Susquehanna Broadcasting Co.,* 727 *F. Supp.* 169, 177 (M.D. Pa. 1989) (applying Pennsylvania law as construing pollution-exclusion clause to bar coverage for all damage caused by gradual pollution irrespective of whether insured had knowledge or participated in discharges, and denying coverage to insured for property damage caused over several years by improper hazardous waste disposal practices engaged in by hauler hired by insured), *amended in part on other grounds,* 738 *F. Supp.* 896 (M.D. Pa. 1990), *aff'd,* 928 *F.*2d 1131 (3d Cir.), *cert. denied,* ___ *U.S.* ___, 112 *S. Ct.* 86, 116 *L. Ed.* 2d 58 (1991); *C.L. Hathaway Sons v. American Motorists Ins.,* 712 *F. Supp.* 265, 267-69 (D. Mass. 1989) (applying Massachusetts law as construing "sudden" to have temporal aspect and holding that property damage caused by gradual escape of toluene from underground pipe at slow rate over lengthy period ineligible for cov-

erage under "sudden and accidental" exception to pollution-exclusion clause); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 *F. Supp.* 1317, 1326 (E.D. Mich. 1988) (applying Michigan law to construe "sudden" as meaning "brief, momentary or lasting only a short time" but without resolving coverage questions and ultimately concluding after trial that insurers not obligated to indemnify insured for cost of cleanup of property damage resulting from chemical contamination in view of finding that damage had been expected or intended from standpoint of insured, 750 *F. Supp.* 1340, 1350 (E.D. Mich. 1990)); *State of New York v. Amro Realty Corp.*, 697 *F. Supp.* 99, 110 (N.D.N.Y. 1988) (applying New York law as defining "sudden" to mean happening without previous notice or on very brief notice, unforeseen, unexpected, unprepared for, and holding that property damage caused by intentional discharges of chemical solvents into drains and septic systems by insured's lessee over twenty-year period ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd in part, rev'd in part*, 936 *F.*2d 1420 (2d Cir. 1991); *United States Fidelity & Guar. Co. v. The Murray Ohio Mfg. Co.*, 693 *F. Supp.* 617, 620-22 (M.D. Tenn. 1988) (applying Tennessee law as defining "sudden" to have temporal meaning combining "unexpected" with "quick," and holding that property damage resulting from insured's delivery of hazardous waste over six-year period to hauler for disposal at hauler's site ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd* 875 F.2d 868 (6th Cir. 1989); *Hayes v. Maryland Casualty Co.*, 688 *F. Supp.* 1513, 1515 (N.D. Fla. 1988) (applying Florida law to construe pollution-exclusion clause to bar coverage for property damage caused by pollution extending over substantial period of time and holding property damage caused by intentional deposits on insured's property of filtration material from dry-cleaning fluid over extended period ineligible for coverage under pollution-exclusion clause

whether or not insured had expected or intended damage to occur); *Borden, Inc. v. Affiliated FM Ins.*, 682 *F. Supp.* 927, 930 (S.D. Ohio 1987) (applying Ohio law as defining "sudden" to mean "happening without previous notice or with very brief notice" and holding property damage resulting from regular and intentional deposits of radioactive and hazardous wastes over six years, creating thirty-five-foot pile covering thirty-five to forty acres, ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd*, 865 *F.*2d 1267 (6th Cir.), *cert. denied*, 493 *U.S.* 817, 110 *S. Ct.* 68, 107 *L. Ed.* 2d 35 (1989); *Centennial Ins. Co. v. Lumbermens Mut. Casualty Co.*, 677 *F. Supp.* 342, 348-49 (E.D. Pa. 1987) (applying Pennsylvania law as defining "sudden" to exclude discharges occurring continuously or even sporadically over period of time and holding that property damage resulting from improper disposal by insured's hauler of waste shipments containing over 79,000 gallons of hazardous waste delivered to hauler over thirteen-month period ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *American Motorists Ins. Co. v. General Host Corp.*, 667 *F. Supp.* 1423, 1428-31 (D. Kan. 1987) (construing "sudden" to mean unexpected and happening on brief notice, and holding that property damage arising from pollution of aquifer caused by discharges of salt brine in course of regular operation of salt plant over seventy-five years ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *aff'd*, 946 *F.*2d 1482, *remanded after reh'g*, 946 *F.*2d 1489 (10th Cir. 1991); *Fischer & Porter Co. v. Liberty Mutual Ins. Co.*, 656 *F. Supp.* 132, 140 (E.D. Pa. 1986) (applying Pennsylvania law as defining "sudden" to mean abrupt, without warning, and holding that property damage including contamination of wells and aquifers resulting from continuous dumping of toxic chemicals into drains that discharged on ground ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

Some state courts have adopted a similar interpretation of the pollution-exclusion clause. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 *Cal. App.* 4th 715, 15 *Cal. Rptr.* 2d 815, 841-42 (1993) (construing "sudden and accidental" as conveying sense of unexpected event that is abrupt or immediate but not requiring that polluting event necessarily terminate quickly or have brief duration); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1993 WL 241520, at 5 (Fla. July 1, 1993)[1] (construing "sudden and accidental" to be unambiguous and to include sense of immediacy or abruptness, and holding that pollution-exclusion clause barred coverage for property damage caused by discharges of oil at plant site in regular course of business by company to which insured had sold used crankcase oil generated by insured's business); *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 168 *Ill. App.* 3d 361, 119 *Ill. Dec.* 96, 106-08, 522 *N.E.*2d 758, 768-70 (1988) (construing "sudden" to mean "without or on brief notice, abruptly or hastily" and holding that property damage caused by insurer's activities in regular course of business including emptying used barrels of chemicals and toxic wastes on grounds of insured's premises ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass 747, 610 N.E.2d 912 (1993) (construing "sudden" to be without ambiguity and to have temporal meaning, observing that whether discharge of pollutants is "sudden and accidental" is determined from perspective of discharger rather than

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[1] On July 1, 1993, the Florida Supreme Court, in a four-to-three decision, withdrew its prior opinion in this litigation, *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1992 WL 212008, at 4-8 (Fla. Sept. 3, 1992), in which the court had construed "sudden and accidental" to mean unexpected and unintended, had determined that the purpose of the pollution-exclusion clause was to bar coverage for knowing polluters, and held that the pollution-exclusion clause did not bar the insured's claim for coverage. The court's prior decision also had been rendered by a divided court, four-to-three.

from perspective of insured, and holding insured's claims for indemnity for cost of remediating property damage caused by intentional discharges of pollutants by insured's waste processor ineligible for coverage under pollution-exclusion clause); *Liberty Mut. Ins. Co. v. SCA Servs., Inc.*, 412 *Mass.* 330, 588 *N.E.*2d 1346, 1349-50 (1992) (construing "sudden" as having temporal element suggesting abruptness and holding that property damage resulting from routine business activity over several months during which barrels containing hazardous waste had been emptied into open trenches or dumped into trenches and flattened with bulldozer ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 407 *Mass.* 675, 555 *N.E.*2d 568, 572 (1990) (deciding only legal issues certified by federal district court in *In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 725 *F. Supp.* 1264 (D. Mass. 1989), *answer conformed to* 938 *F.*2d 1423 (1st Cir. 1991), *cert. denied*, ___ *U.S.* ___, 112 *S. Ct.* 969, 117 *L. Ed.* 2d 134 (1992), and holding that in context of pollution-exclusion clause "sudden" is unambiguous, has temporal quality, and abruptness of commencement of pollutant's discharge is crucial element); *Upjohn Co. v. New Hampshire Ins. Co.*, 438 *Mich.* 197, 476 *N.W.*2d 392, 397-401 (1991) (concluding that "sudden" is defined with "a temporal element that joins together conceptually the immediate and the unexpected," and holding that where tank-level measurements of storage tank with toxic by-product dropped from 475 gallons to 80 gallons on day 1700 gallons of by-product was added, and continued to show low-level readings over ensuing three weeks while 13,600 additional gallons of by-product were added, property damage caused by leakage of 12,000 to 18,000 gallons of toxic by-product was ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 *N.C.* 688, 340 *S.E.*2d 374,

382-83 (1986) (defining "sudden" as describing an abrupt or precipitant event, and holding that cleanup cost of contaminated groundwater resulting from insured's disposal over six-year period of solid wastes at landfill that leached into contaminated adjacent property ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Transamerica Ins. Co. v. Sunnes*, 77 *Or. App.* 136, 711 *P.*2d 212, 214 (1985) (holding property damage caused by intentional discharges in regular course of business of acid and caustic wastes into city sewer line ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause even if damage had been unintended), *cert. denied,* 301 *Or.* 76, 717 *P.*2d 631 (1986); *Technicon Elecs. Corp. v. American Home Assurance Co.*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 *N.E.*2d 1048, 1050-51 (1989) (holding property damage caused by intentional discharges of toxic wastes into waterway ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Lower Paxon Township v. United States Fidelity & Guar. Co.*, 383 *Pa. Super.* 558, 557 A.2d 393, 402-04 (concluding that although "sudden" can include element of "unexpectedness," its use in conjunction with "accidental" reflects additional element of abruptness and brevity, and holding that evidence that methane-gas discharges from Township's landfill, which had been detected and monitored for approximately eighteen months, had penetrated into basement of residence of plaintiff in underlying litigation insufficient to support jury verdict requiring insurer to indemnify Township pursuant to "sudden and accidental" exception to pollution-exclusion clause), *appeal denied,* 523 Pa. 649, 567 *A.*2d 653 (1989); *Techalloy Co. v. Reliance Ins. Co.*, 338 *Pa. Super.* 1, 487 *A.*2d 820, 826-28 (1984) (holding that claim for personal injuries asserted against insured seeking damages for injuries caused by intentional dumping of toxic waste over

twenty-five years ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

As noted, those decisions turn primarily on the literal language of the pollution-exclusion clause, and typically make no reference to its derivation or regulatory history. We infer from their factual context that many of those cases, particularly those in which the polluting activity was intentional or continued over a period of years, could have been decided on the basis that no covered "occurrence" had been proved because the eventual damage had been intended or expected. Because the underlying facts in many of those cases reflect irresponsible waste-disposal practices on the part of insureds, the determination denying coverage would probably have been unaffected even if "sudden" had been construed to mean unexpected rather than abrupt, the purposeful and routine characteristic of the discharges rather than the temporal quality of "sudden" being decisive in most instances.

c. ***Cases Holding that the Meaning of Sudden is "Unexpected" and not Necessarily Temporal or Concluding that "Sudden and Accidental" Exception is Ambiguous and to be Construed Against Insurer.***

In addition to the New Jersey lower court cases, *supra* at 44-46, 629 A.2d at 856-857, a significant number of federal and state courts have declined to construe "sudden" as necessarily conveying a temporal meaning akin to abrupt, or have determined that either the word "sudden" or the "sudden and accidental" exception to the pollution-exclusion clause is ambiguous and to be construed against the insurer. A common characteristic of those cases is that the conduct of the *insureds* is generally less culpable than that reflected in cases construing "sudden" to have a temporal meaning, relatively few of these *insureds* having regularly engaged in willful or knowing pollution. To the extent that some cases conclude that the "sudden and accidental" exception to the pollution-exclusion clause is

ambiguous, those courts have identified three alternative justifications for that conclusion: (1) the background and regulatory history of the pollution-exclusion clause, *see supra* at 31-43, 629 A.2d at 848-856; (2) the variations found in standard dictionary definitions of "sudden"; or (3) the antecedent judicial interpretation of the "sudden and accidental" clause as it had been used in so-called "boiler and machinery" policies. As background, we briefly elaborate on the latter two grounds advanced by some courts to support the conclusion that "sudden and accidental" is ambiguous.

Because the words "sudden" and "accidental" in the standard CGL policy are undefined, courts often resort to the general rule that the terms in an insurance policy should be interpreted in accordance with their plain and commonly-understood meaning. *Lansco, supra,* 138 *N.J. Super.* at 281-82, 350 A.2d 520. In *Hecla Mining Co. v. New Hampshire Insurance Co.,* 811 *P.*2d 1083 (1991), the Colorado Supreme Court turned to dictionary definitions to inform its interpretation of the word "sudden":

> [W]e find that a number of recognized dictionaries differ on the meaning of the term "sudden." Webster's Third New International Dictionary 2284 (1986) attaches a number of definitions to "sudden." Webster's first defines "sudden" as "happening without previous notice . . . occurring unexpectedly . . . not foreseen." Webster's then lists synonyms for "sudden" that include "prompt" and "immediate." Random House Dictionary of the English Language 1900 (2 ed. 1987) defines the word "sudden" in a temporal sense as "happening, coming, made, or done quickly." Black's Law Dictionary 1284 (5th ed. 1979) defines "sudden" as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for."

* * * *

> Although "sudden" can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended. Since the term "sudden" is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase "sudden and accidental" against the insurer to mean unexpected and unintended.
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> [*Id.* at 1091-92.]

Similarly, the Georgia Supreme Court's frequently-quoted analysis of the meaning of "sudden" also relies on dictionary meanings and usages to support its conclusion that the primary sense of "sudden" is "unexpected":

> The primary dictionary definition of the word is "happening without previous notice or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for." Webster's Third New International Dictionary, at 2284 (1986). *See also* Funk and Wagnalls Standard Dictionary, at 808 (1980); Black's Law Dictionary, at 1284 (1979). The definition of the word "sudden" as "abrupt" is also recognized in several dictionaries and is common in the vernacular. Perhaps, the secondary meaning is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. *See also,* Oxford English Dictionary, at 96 (1933) (giving usage examples dating back to 1340, e.g., "She heard a sudden

> step behind her"; and, "A sudden little river crossed my path As unexpected as a serpent comes.") Thus, it appears that "sudden" has more than one reasonable meaning. And, under the pertinent rule of construction the meaning favoring the insured must be applied, that is, "unexpected."
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> [*Claussen v. Aetna Casualty & Sur. Co.*, 259 *Ga.* 333, 380 *S.E.*2d 686, 688 (1989) (footnote omitted).]

Other courts have noted the use and judicial construction of the phrase "sudden and accidental" in the standard boiler and machinery policy to support the view that "sudden" need not be construed as synonymous with abrupt. *See, e.g., CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 *F.*2d 77, 93-94 (1st Cir. 1992); *New Castle, supra,* 933 *F.*2d at 1197. They rely on the principle that "[t]he judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the construction intended to be adopted by the parties." 2 G. Couch, *Couch on Insurance* 2d § 15:20, at 195-96 (M. Rhodes rev. 2d ed. 1984). More than a decade before drafting of the pollution-exclusion clause commenced, state courts had construed the phrase "sudden and accidental" in boiler-and-machinery policies.

In *New England Gas & Electric Ass'n v. Ocean Accident & Guarantee Corp.*, 330 *Mass.* 640, 116 *N.E.*2d 671 (1953), the defendant issued a machinery-and-boiler policy covering a turbine that drove a generator. The policy covered damages caused by an "accident," and defined that word as "a sudden and accidental breaking, deforming, burning out or rupturing of the Object or any part thereof, which immediately impairs the functions of the Object and necessitates repair or replacement before its functions can be restored * * * ." *Id.* 116 N.E.2d at 675. While being operated, the turbine began to run roughly, and was shut down after about one and one-quarter hours; the cause of

the rough operation was a crack in the turbine spindle. The Supreme Judicial Court of Massachusetts held the damage to be covered by the terms of the policy:

> If we lay to one side any idea of the rapidity or quickness in the actual cracking of the spindle and give the term sudden its primary meaning according to the lexicographers as a happening without previous notice or with very brief notice, or as something coming or occurring unexpectedly, unforeseen, or unprepared for, then the cracking of the spindle comes within this concept of the word, for it is plain from the report of the auditor that the mechanical defect which caused the cracking arose through no fault and even without the negligence of the insured and that the latter had no knowledge of the existence of the defect, much less any reason to anticipate that it would cause damage to the turbine. In fact, no one knew the cause of the damage until after the spindle had been replaced. The damage to the spindle could not be reasonably anticipated, and its occurrence was unexpected and unforeseen and consequently sudden in the ordinary meaning of the word.
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> [*Id.* 116 N.E.2d at 680-81.]

The boiler-and-machinery policy in *Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co.*, 53 *Wash.* 2d 404, 333 *P.*2d 938 (1959), covered a large band saw. Loss was covered if "occasioned by an accident, defined as the sudden and accidental breaking of the bandsaw wheel, or any part thereof, into two or more separate parts while it was in use or connected for use." *Id.* 333 P.2d at 939. The saw began to vibrate more than usual, and was taken out of service two days later. When the wheel was removed, one of its spokes was found to be cracked all the way through and another was partially cracked. The insured's expert testified that "there was a gradual cracking, extending through three quarters of the

broken spoke, which must have occurred over a period of from one day to three weeks, but that the breaking of the last quarter was instantaneous." *Id.* at 940.

The trial court concluded that the break was "sudden" within the meaning of the policy, and the Supreme Court of Washington affirmed:

> The word "sudden" is defined in Funk & Wagnalls Standard Dictionary of the English Language as, "happening quickly and without warning; coming unexpectedly or in an instant; as, *sudden* death; *sudden* dismissal." In Webster's New International Dictionary (2d Ed.), it is defined: "Happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for; as, a *sudden* shower, death, emergency, turn for the better, or attack of the enemy."
>
> The purpose of the contract was to insure the respondent against an accidental breakdown of the equipment covered by the policy. The word "sudden" was, of course, placed in the contract for a purpose. Is it more reasonable to assume that it was placed there to show an intent to exclude coverage of a break which did not happen instantaneously, or to exclude coverage of a break which was unforeseen and therefore unavoidable? It seems to us that the risk to the insurer would be the same, whether a break was instantaneous or began with a crack which developed over a period of time until the final cleavage occurred, as long as its progress was undetectable. On the other hand, the insured should not be permitted to proceed recklessly and hold the insurer liable for damage if it had been forewarned of a possible break and could have taken steps to forestall it or avoid an interruption of business resulting therefrom.
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> * * * There is no suggestion that the policy was not meant to cover breakage resulting from latent

> defects in the machinery or from fatigue. The cause is not, nor is the result, one which it is claimed is excluded. It is only contended that the result, in order to be within the coverage of the policy, must have happened instantaneously. *We do not so construe the word "sudden," when its primary meaning, in common usage, is not "instantaneous" but rather "unforeseen and unexpected."*
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> [*Id.* at 940-41 (last emphasis added).]

See also Julius Hyman & Co. v. American Motorists Ins. Co., 136 *F. Supp.* 830, 832-33 (D. Colo. 1955) (holding that leak in boiler pipe that occurred after gradual weakening of pipe over time had caused pipe to split at weakest point constituted sudden and accidental cracking of pipe under boiler-and-machinery policy); *City of Detroit Lakes v. Travelers Indem. Co.*, 201 *Minn.* 26, 275 *N.W.* 371, 372 (1937) (upholding jury verdict for insured and concluding that rupture of casting in insured's power-plant steam engine, although caused by conditions that developed gradually and slowly, was sudden and accidental within meaning of standard boiler-and-machinery policy). *But see Cornell Wood Prods. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 62 *F. Supp.* 303, 305 (N.D. Ill. 1945) (holding that damage to generator caused by submersion in water for sixty hours following three-day flood did not constitute sudden and accidental breaking of generator under standard boiler-and-machinery policy).

Perhaps the most significant aspect of the boiler-and-machinery policy cases lies in the Washington Supreme Court's observation that from the insurer's standpoint little if any justification existed for distinguishing between breaks in machinery that occurred instantaneously and those that resulted from gradual wear but were undetectable: "It seems to us that the risk to the insurer would be the same, whether a break was instantaneous or began with a crack which developed over a period of time until

the final cleavage occurred, as long as its progress was undetectable." *Anderson & Middleton, supra,* 333 *P.*2d at 940. The court's analysis suggests that the absence of "suddenness" is a poor proxy for fault, that non-sudden events can be as blameless as "sudden" ones. An analogous view of the arbitrariness of conditioning pollution coverage on the suddenness, or abruptness, of the discharge of pollutants also may have informed those courts that have declined to accord "sudden" a temporal meaning in the context of the pollution-exclusion clause.

Those federal courts that have avoided a strict, temporal construction of "sudden and accidental" are often influenced significantly by their analysis of the applicable state law. *See CPC Int'l, supra,* 962 *F.*2d at 95-98 (applying New Jersey Law, predicting on basis of *New Castle, supra,* 933 *F.*2d 1162, that New Jersey Supreme Court would construe pollution-exclusion clause to be ambiguous and would follow holding in *Broadwell, supra,* 218 *N.J. Super.* 516, 528 A.2d 76, and remanding to district court to determine whether property damage for which indemnity was sought had been intended or expected from standpoint of insured); *Broderick Inv. Co. v. Hartford Accident & Indemn. Co.,* 954 *F.*2d 601, 608 (10th Cir.) (applying Colorado law, determining that phrase "sudden and accidental" is ambiguous, construing "sudden and accidental" to mean unexpected and unintended, and holding that property damage resulting from insured's intentional discharge of toxic chemicals into storage ponds was ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *cert. denied,* ___ *U.S.* ___, *113 S. Ct.* 189, 121 *L. Ed.* 2d 133 (1992); *New Castle, supra,* 933 *F.*2d at 1198-1203 (applying Delaware law, finding phrase "sudden and accidental" ambiguous, construing it to mean unexpected and unintended, but because phrase modifies discharge, holding that even if damage was unintended, coverage was unavailable unless *discharge* is unexpected and unintended; remanding to district court to determine

whether discharge of leachate from county-operated landfill was unexpected and unintended), on remand, 778 *F. Supp.* 812, 819-20 (D. Del, 1991) (holding that because leachate not known by county to be contaminant at time of discharge, discharge of leachate *as pollutant* was unexpected and unintended, invoking coverage under "sudden and accidental" exception), *rev'd*, 970 *F.*2d 1267, 1270-73 (3d Cir. 1992) (holding that knowledge of contaminating quality of substance discharged is irrelevant and construing pollution-exclusion clause as imposing on insured risk of discharge of known contaminants); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 *F.*2d 1200, 1204-06 (2d Cir. 1989) (applying New York law, and holding that insurer has duty to defend insured in shipbuilding and repairing enterprise that had sold chemical compounds and salvage oil to operator of twenty-year-old Louisiana dump site against litigation by private plaintiffs and State of Louisiana seeking damages from insured as "generator" of waste at dump site; duty to defend exists absent proof that discharges of pollutants at dump site were not sudden and accidental), *cert. denied*, 496 *U.S.* 906, 110 *S. Ct.* 2588, 110 *L. Ed.* 2d 269 (1990); *Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1210-12 (8th Cir. 1987) (determining that whether claims against insured arose from "sudden accident" in nonstandard pollution-exclusion clause depends on whether insured expected or intended damage at time of discharge, and holding that discharge of soot from hospital's boiler stack because of malfunction and on occasions subsequent to applications of soot removal compound constituted "sudden accidents involving pollutants," *id.* at 1212, requiring coverage under CGL policy); *MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co.*, 795 *F. Supp.* 941, 945-47 (D. Alaska 1991) (concluding that sudden "in everyday English" has temporal meaning, is also understood to mean "happening without warning," and that focus of phrase "sudden and accidental" is on unexpected or unforeseen

nature of event, *id.* at 1459; holding that factual issue requiring trial was presented concerning whether discharge of benzene into groundwater from oil refinery operation characterized by innovative environmental-protection system had been unexpected and accidental); *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 *F. Supp.* 35, 41 (D. Mass. 1989) (applying Massachusetts law and holding property damage caused by undetected leak in two-inch pipe discharging five to six gallons of gasoline five times weekly over six-year period eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *vacated*, 784 *F. Supp.* 927 (D. Mass. 1990); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 *F. Supp.* 1139, 1155-61 (W.D. Mich. 1988) (rejecting temporal definition of term "sudden," and holding insurers obligated to provide defense to insured in underlying action alleging sudden and accidental discharge of hazardous waste in insured's regular course of operations absent showing by insurers that allegations seek coverage for discharges barred by pollution-exclusion clause); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., supra*, 668 *F. Supp.* at 1548-50 (applying Florida law, construing "sudden and accidental" to mean unexpected and unintended, and holding that claims for damages based on contamination of aquifer resulting from intentional discharges of transformer oil that, unknown to insured, contained PCBs eligible for coverage under CGL policy within "sudden and accidental" exception to pollution-exclusion clause); *United States v. Conservation Chem. Co.*, 653 *F. Supp.* 152, 160, 201-04 (W.D. Mo. 1986) (finding pollution-exclusion clause ambiguous, and denying insurers' motions for summary judgment based on contention that pollution-exclusion clause eliminated duty to defend claims for property damage asserted against four generators who had delivered wastes to Missouri waste-disposal facility from which hazardous wastes had migrated); *National Grange Mut. Ins. Co. v. Continental Casualty Co.*, 650 *F. Supp.*

1404, 1409-12 (S.D.N.Y. 1986) (applying New York law, finding pollution-exclusion clause to be ambiguous, "sudden" not limited to instantaneous happening and construing "sudden and accidental" to mean unexpected and unintended; denying insurer's summary-judgment motions based on pollution-exclusion clause to preclude coverage of insured for property damage caused by discharges of ash in operation of scrap-metal business in view of factual issue concerning insured's knowledge that ash constituted hazardous substance); *City of Northglenn v. Chevron U.S.A., Inc.*, 634 *F. Supp.* 217, 220-23 (D. Colo. 1986) (applying Colorado law, finding pollution-exclusion clause to be ambiguous, triggering rule requiring clause to be construed against insurer and holding that whether property damage caused by gasoline leakage from underground line connecting gasoline tanks to dispensers was ineligible for coverage under CGL policy's pollution-exclusion clause could not be determined without factual record); *Payne v. United States Fidelity & Guar. Co.*, 625 *F. Supp.* 1189, 1191-93 (S.D. Fla. 1985) (applying Florida law, construing "sudden and accidental" as meaning unexpected and unintended and holding that property damage allegedly caused by insured's refusal to grant EPA contractors access to site and failure to contain spread of PCBs discharged by metal-recovery business on adjacent property eligible for coverage under "sudden and accidental" exception to CGL policy pollution-exclusion clause).

A significant number of state courts have reached similar conclusions, construing "sudden" as non-temporal or discerning ambiguity in the phrase "sudden and accidental." *See Hecla Mining Co. v. New Hampshire Ins. Co., supra*, 811 *P.*2d at 1090-92 (construing "sudden and accidental" to mean unexpected and unintended, and holding that claims for property damage resulting from surge of sedimentary sludge from mining tunnel attributable partly to insured's discharge of heavy metals in course of mining operations subject to insurer's duty to defend based on

"sudden and accidental" exception to pollution-exclusion clause); *Claussen, supra,* 380 *S.E.*2d at 688-90 (construing "sudden" to mean unexpected, and holding that cost of remediating property damage caused by dumping over several years of industrial and chemical waste on fifty-two-acre site leased by insured to City of Jacksonville for use as landfill eligible for coverage notwithstanding CGL policy's pollution-exclusion clause); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.,* 154 *Ill.* 2d 90, 180 Ill. Dec. 691, 704-09, 607 *N.E.*2d 1204, 1217-22, (1992) (construing "sudden" to mean unexpected or unintended, and holding that claims for remediation of property damage involving contamination of Waukegan Harbor and Lake Michigan resulting from discharges over several years of hydraulic oil in ordinary course of insured's outboard-motor-manufacturing business, such oil having contained PCBs allegedly without insured's knowledge, subjected insurers to duty to defend under "sudden and accidental" exception to pollution-exclusion-clause; resolution of insurer's duty to indemnify held subject to factual determinations after trial); *United States Fidelity & Guar. Co. v. Specialty Coatings Co., supra,* 129 Ill. Dec. at 310-13, 535 *N.E.*2d at 1075-78 (construing "sudden and accidental" non-temporally to mean unexpected and unintended, and holding that claims for remediation of property damage resulting from open dumping of hazardous wastes by hauler to whom insured and others had delivered industrial wastes for proper disposal covered by "sudden and accidental" exception to pollution-exclusion clause in insured's CGL policy); *Reliance Ins. Co. v. Martin,* 126 *Ill. App.* 3d 94, 81 *Ill. Dec.* 587, 467 *N.E.*2d 287, 289-90, (1984) (construing "sudden and accidental" non-temporally to mean unexpected and unintended, and holding that factual issues were presented concerning whether property damage and personal injuries caused by carbon monoxide and soot regularly escaping from parking garage and entering adjacent condominium unit eligible for coverage under "sudden and accidental"

exception to pollution-exclusion clause); *Grinnell Mut. Reins. Co. v. Wasmuth*, 432 *N.W.*2d 495, 497-500 (Minn. Ct. App. 1988) (construing "sudden" to mean unexpected, and holding that property damage resulting from improper installation of insulation causing gradual emission of formaldehyde in residential premises eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Colonie Motors, Inc. v. Hartford Accident & Indem. Co.*, 145 *A.D.*2d 180, 538 *N.Y.S.*2d 630, 631-32 (1989) (concluding that phrase "sudden and accidental" should be construed not in abstract but in context of relevant facts, and holding property damage caused by crack in underground pipe of containment unit installed to prevent oil leakage and resulting in undetected and continuing discharge of waste oil that had contaminated groundwater eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Niagara County v. Utica Mut. Ins. Co., supra*, 439 *N.Y.S.*2d at 540-42 (construing pollution-exclusion clause to apply only to "actual polluters," and holding that pollution-exclusion clause did not bar County's right to defense from CGL carrier in underlying "Love Canal" litigation alleging that County had failed to warn and safeguard citizens from dangers of toxic-waste discharges); *Farm Family Mut. Ins. Co. v. Bagley*, 64 *A.D.*2d 1014, 409 *N.Y.S.*2d 294, 295-96 (1978) (finding pollution-exclusion clause ambiguous, and holding that factual issue presented on whether property damage to crops caused by intentional spraying of chemicals on insured's fields that accidentally had been dispersed to adjacent farmland eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Allstate Ins. Co. v. Klock Oil Co.*, 73 *A.D.*2d 486, 426 *N.Y.S.*2d 603, 604-05 (1980) (construing "sudden" non-temporally, and holding that property damage allegedly caused by undetected leak from insured's gasoline storage tank eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *Kipin Indus., Inc. v. American*

Universal Ins Co., 41 *Ohio App.* 3d 228, 535 *N.E.*2d 334, 338 (1987) (finding pollution-exclusion clause ambiguous, relying on 1970 IRB submission to state regulators construing clause to bar coverage only when damage was intended or expected, and holding that claims for property damage resulting from continuous discharges of toxic chemicals by firm hired by insured's affiliate properly to dispose of hazardous waste subject to duty to defend under "sudden and accidental" exception to pollution-exclusion clause); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 *Ohio App.* 3d 127, 477 *N.E.*2d 1227, 1233-35 (1984) (finding pollution-exclusion clause ambiguous, construing "sudden" non-temporally to mean unexpected, and holding that property damage caused by continuing course of irresponsible waste-disposal practices by operator of hazardous-waste facility hired by insured and others to dispose of hazardous waste subject to insurer's duty to defend under "sudden and accidental" exception to pollution-exclusion clause); *United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, *34 Wash. App.* 708, 664 *P.*2d 1262, 1266-67 (1983) (finding pollution-exclusion clause ambiguous, intended solely to bar coverage for active polluters, construing clause to bar coverage only for expected or intended events, and holding that claims for property damage caused by 80,000-gallon gasoline leak from small hole in underground pipe continuing over several months subject to CGL carrier's duty to defend under "sudden and accidental" exception to pollution-exclusion clause).

Two additional decisions that merit particular attention are *Joy Technologies, supra,* 421 *S.E.*2d at 499, and *Just, supra,* 456 *N.W.* 2d at 573, in which both the Wisconsin and West Virginia Supreme Courts held that the pollution-exclusion clause bars coverage only for pollution-caused property damage that was intended or expected. In reaching that conclusion both courts relied significantly on the regulatory history of the pollution-exclusion clause, *Joy Technologies, supra,* 421 *S.E.*2d at 498-99, *Just, supra,* 456

*N.W.*2d at 574-75, as did the courts in *New Castle, supra, 933 F.*2d at 1196-98, *Claussen, supra,* 380 *S.E.*2d at 689, *Specialty Coatings, supra,* 129 *Ill.Dec.* at 311-13, 535 *N.E.* 2d at 1076-78, *Broadwell, supra,* 218 *N.J. Super.* at 533-34, 528 A.2d 76, and *Kipin Indus., supra,* 535 *N.E.* 2d at 338. Our extensive discussion earlier in this opinion concerning the regulatory history of the pollution-exclusion clause, *supra* at 31-43, 629 A.2d at 848-855, did not focus on the significant emphasis placed on that history by a number of courts that had found the meaning of the clause to be ambiguous in part because of the manner in which the industry had presented the clause to state regulatory agencies. In *Just, supra,* property owners adjacent to a landfill sought damages for personal injuries and property damage allegedly caused by the landfill's improper waste-disposal practices, and joined the landfill's CGL carrier as a third-party defendant. Relying on the pollution-exclusion clause, the lower courts held that that clause barred coverage for the claims. Reversing, the Wisconsin Supreme Court construed the clause as affording coverage essentially equivalent to that provided under the previously-issued "occurrence"-based policy, basing its holding substantially on the industry's representations to regulators in seeking approval of the pollution-exclusion clause:

> Contemporaneous representations by the insurance industry confirm that the drafting committee, in creating the exclusionary clause, clarified but did not reduce the scope of coverage. This expressed intent was also the interpretation relied upon by insurance regulators in approving the exclusionary clause when it was submitted for approval to various state insurance commissioners by representatives of the insurance industry.
>
> In May 1970, both insurance industry trade associations, (the Mutual Insurance Rating Bureau and the Insurance Rating Board,) submitted the standard pol-

lution exclusion for approval by state regulatory authorities throughout the country.

* * * *

Some states questioned whether the purpose of the pollution exclusion was "limiting the coverage and not clarifying it." The Mutual Insurance Rating Bureau, which assisted in the draft of the exclusion endorsement, in a submission to the West Virginia Commissioner of Insurance, explained that the intent of the clause was to clarify " 'that the definition of occurrence excludes damages that can be said to be *expected or intended.*' " [quoting *Pendygraft, supra,* 21 *Ind. L. Rev.* at 154].

* * * *

Furthermore, documents presented by the Insurance Rating Board to the Georgia Insurance Commissioner when the pollution exclusion clause was first adopted suggest that the clause was intended to exclude only intentional polluters. The Insurance Rating Board represented "'the impact of the [pollution exclusion clause] on the vast majority of risks would be no change. It is rather a situation of clarification * * *. Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued * * * .' " [quoting *Claussen, supra,* 676 *F. Supp.* at 1573].

[456 *N.W.*2d at 575.]

In *Joy Technologies, supra,* 421 *S.E.*2d 493, the insured had been engaged from 1968 to 1980 in the cleaning and rebuilding of motors used in mining machinery, requiring the regular and continuing disposal of oil contained in the motors. Although the record suggested that the insured's disposal practices "were commonly accepted in the industry at the time," *id.* at 498, Joy Technologies routinely

disposed of PCB-contaminated oil in a storm drain and on its property, resulting in contamination of the insured's site and adjacent property. Joy sought coverage for remediation costs from Liberty Mutual, and the lower court held that the pollution-exclusion clause barred Joy's claim for indemnification. The West Virginia Supreme Court reversed, relying exclusively on the regulatory proceeding before the West Virginia Insurance Commissioner for its conclusion that the pollution-exclusion clause should be construed in a manner consistent with the industry's representations to state authorities indicating its intended effect:

> Before the exclusion clause could be legally incorporated into the commercial general liability policy in West Virginia, it was necessary that Liberty Mutual obtain the approval of the West Virginia Insurance Commissioner. Before incorporating the exclusion clause, in accordance with West Virginia law, Liberty Mutual submitted the exclusion language to the West Virginia Insurance Commissioner for his approval.
>
> The West Virginia Insurance Commissioner held hearings to consider the proposed exclusionary language. The record shows that, in conjunction with the submissions, the Insurance Rating Board and apparently also the Mutual Insurance Rating Board, acting on behalf of their members and subscribers, including Liberty Mutual, included with their submission of the proposed exclusion language an explanation [of the clause].
>
> * * * *
>
> This conclusion is further supported by an affidavit submitted by the former West Virginia Insurance Commissioner, who officially authorized the inclusion of the exclusion in West Virginia policies. That affidavit stated that "in preliminary submissions on the matter, the insurers represented that the proposed forms did not limit and were not intended to limit

the coverage." The Commissioner also said in the affidavit that:

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations, I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and the Mutual Insurance Rating Bureau.

* * * *

In this Court's view, it appears clear from the foregoing discussion that the 1966 commercial general liability insurance policies, as originally issued, covered gradual bodily injury and gradual property damage resulting over a period of time from exposure to the insured's waste disposal, as was suggested by Mr. Bean in the memorandum issued in conjunction with the drafting of the policies. They, however, as originally issued, excluded damage resulting from expected and intended pollution, as indicated by the Insurance Rating Board and the Mutual Insurance Rating Board in their 1970 filings with the West Virginia State Insurance Commissioner. Further, from the filings it is clear that in seeking approval of the exclusion provision, the insurance companies did not represent that they intended to exclude any risk which was not excluded in the original policies, but that they merely intended to clarify what had been excluded in the original policies. In approving the new policy language, the West Virginia Insurance Commissioner

specifically stated that the companies and rating organizations had represented that the proposed exclusions were mere clarifications of existing coverage, and in approving the language the Insurance Commissioner approved it only "to the extent that said exclusions are mere clarifications of existing coverages."

This Court has recognized that where a definite meaning has been ascribed to language used in an insurance policy, that meaning should be given to the language by the courts. *Christopher v. United States Life Insurance Company in City of New York*, 145 *W.Va.* 707, 116 *S.E.*2d 864 (1960). In view of this, and in view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, coverage which included the injuries in the present case, this Court must conclude that the policies issued by Liberty Mutual covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.

[*Id.* at 498-500 (footnote omitted).]

3. ***The Pollution-Exclusion Clause Bars Coverage Only for Intentional Discharges, Dispersals, Releases, or Escapes of Known Pollutants.***

We discern from the decisional law a tendency on the part of courts to construe "sudden" most restrictively in cases in which insureds have discharged known pollutants intentionally and on a regular and continuous basis over many years, *see, e.g., Ogden Corp. v. Travelers Indem. Co., supra*, 924 *F.*2d at 41-42, and in such circumstances courts rarely address the regulatory history of the pollution-exclusion clause. On the other hand, courts appear to be most inclined to consider non-temporal interpretations of

"sudden and accidental" under circumstances in which the insured appears to be relatively blameless in respect of the discharge of pollutants, as in cases involving undetected leaks in underground gasoline lines, *see, e.g., Colonie Motors, supra.*, 538 *N.Y.S.*2d at 632, cases in which the insured's waste disposal hauler improperly discharged hazardous waste, *see Buckeye Union Ins., supra,* 477 *N.E.*2d at 1233-35, or cases in which pollutants were discharged by entities unaffiliated with the insured but the insured was subjected to remediation responsibilities. *See Payne, supra,* 625 *F. Supp.* at 1191-93.

We also observe that the divergence of authority concerning whether "sudden" should be construed to mean abrupt, *see, e.g., Aardvark Assocs., supra,* 942 *F.*2d at 191-94, or unexpected, *see, e.g., New Castle County, supra,* 933 *F.*2d at 1192-99, is of but limited significance in most factual contexts, pollutant discharges generally occurring neither abruptly nor unexpectedly. Thus, in *New Castle County,* after the Third Circuit had construed "sudden" to mean unexpected, 933 *F.*2d at 1192-99, the district court concluded on remand that although County officials had known that leachate was being discharged from the landfill, the discharge had been unexpected because leachate was not then a known pollutant. 778 *F. Supp.* at 819-20. The Third Circuit reversed, holding that the discharge was not unexpected and that knowledge of a pollutant's contaminating quality is irrelevant. 970 *F.*2d at 1270-73. In *Claussen, supra,* a case in which the City of Jacksonville, as tenant, apparently had engaged in a continuous course of discharging pollutants over several years, the Georgia Supreme Court construed "sudden" to mean unexpected. 380 *S.E.*2d at 690. On remand, the district court concluded that irrespective of whether Jacksonville's dumping of waste had been intentional, the question whether the discharge was unexpected should be determined from the standpoint of Claussen, the insured, holding that that question could not be determined without a trial. *Claussen,*

supra, 754 *F. Supp.* at 1582. That interpretation of the literal language of the pollution-exclusion clause is problematic. Assuming that "sudden" is understood to mean unexpected, the literal language of the pollution-exclusion clause bars coverage unless the discharge was unexpected, the clause itself containing no suggestion that that determination should be made from the standpoint of the insured. A number of other courts that have construed "sudden" to mean unexpected appear to have done so on the assumption that whether the discharge was unexpected should be determined from the insured's perspective, not from the polluters perspective, an assumption that derives no support from the plain language of the pollution-exclusion clause. *See, e.g., Specialty Coatings, supra*, 129 *Ill.Dec.* at 310-313, 535 *N.E.*2d at 1075-78; *Buckeye Union Ins. Co., supra*, 477 *N.E.*2d at 1233-35.

We are persuaded that construing "sudden" to mean unexpected will not materially expand the coverage afforded by the pollution-exclusion clause to a degree that approaches the breadth of coverage that had been afforded under the "occurrence"-based policy. Moreover, we are of the view that an interpretation of "sudden" that does not acknowledge its temporal quality is unfaithful to its core meaning, although that temporal connotation of "sudden" is not inconsistent with an application to events that begin, but not end, abruptly:

> This temporal element of "sudden" is so basic and capable of such broad application that it is often ignored or dismissed as inconsequential by parties and courts interpreting liability policies. Failure to understand this element had led some insureds to argue that the commonly understood meaning of "sudden" has no temporal element. Courts that have not carefully considered the temporal nature of "sudden" have confused it with brevity and have asserted that an event which does not end quickly cannot be sudden. Certainly some "sudden" events do end quickly, due

> to the physical properties of the activity, such as a "sudden shot." * * * A sudden emergency is one which arises abruptly and unexpectedly. The duration of the emergency is irrelevant to the concept. A "sudden need" begins abruptly but need not end quickly. Similarly, a "sudden attack," "sudden fear," and "sudden resolve" may be of long or short duration. Compare a "sudden recognition" of an old schoolmate that may continue for one's lifetime with a "sudden explosion" lasting less than a minute, and a "sudden heat wave" which could last one day or several weeks. In common usage, a "sudden" event is one which begins abruptly or without previous notice, irrespective of whether the duration of that event is short or long.
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> [Ballard & Manus, *supra*, 75 *Cornell L. Rev.* at 615-17 (footnotes omitted).]

As noted, "sudden" events may begin abruptly, and continue undetected for a significant period. In addition, gradual deterioration of a pipeline or container is not necessarily inconsistent with a "sudden" discharge of pollutants. *See, e.g., Van's Westlake Union, supra,* 664 *P.*2d at 1266-67. In our view, however, a construction of "sudden" that acknowledges its temporal quality necessarily results in a severe restriction of coverage for pollution-caused property damage under the literal language of the pollution-exclusion clause.

That understanding of the pollution-exclusion clause's plain meaning reinforces our conclusion that the conflict over whether "sudden" means abrupt or unexpected misses the point, neither interpretation providing coverage for pollution-caused property damage that approaches the coverage afforded under the "occurrence"-based policy. The critical issue is whether the courts of this state should give effect to the literal meaning of an exclusionary clause that materially and dramatically reduces the coverage pre-

viously available for property damage caused by pollution, under circumstances in which the approval of the exclusionary clause by state regulatory authorities was induced by the insurance industry's representation that the clause merely "clarified" the scope of the prior coverage. Our resolution of that issue is heavily influenced by our recognition that this state's regulatory review of the pollution-exclusion clause was incidental to the authority of the Commissioner of Insurance to determine the reasonableness of rates for insurance coverage. *N.J.S.A.* 17:29A-1 to -32. Concededly, no rate change was sought or required in connection with the IRB's submission of the pollution-exclusion clause. But had the IRB asserted then, as the insurers assert in this litigation, that the literal effect of the clause was to limit sharply the coverage for pollution-caused property damage to only those discharges of pollutants that occur *abruptly* and accidentally, the conclusion is inescapable that a significant rate reduction would have been required. The statute specifying the factors to be considered in determining rates includes "the loss experience of the insurer, past and prospective, including where pertinent, the conflagration and catastrophe hazards, if any * * * [and] all factors reasonably related to the kind of insurance involved * * * ." *N.J.S.A.* 17:29A-11. The material and substantial reduction in coverage proposed by the pollution-exclusion clause, if disclosed to regulators in New Jersey and elsewhere, undoubtedly would have affected adversely the industry's rates for CGL coverage. Instead, because of the industry's failure, in its presentation to regulators, to acknowledge and emphasize the sharp reduction in coverage, insureds in New Jersey, and perhaps throughout the country, apparently have paid rates for CGL policies incorporating the pollution-exclusion clause comparable to those paid for the prior "occurrence"-based policies that afforded substantially greater coverage. We note that the New Jersey Department of Insurance's order approving the filing of the pollution-exclusion clause spe-

cifically recites that the approval is based on the determination "that the revised insuring forms will produce coverage at rates which are reasonable, adequate and not unfairly discriminatory in accordance with our statutory standards."

This Court is now asked to construe CGL policies containing the pollution-exclusion clause in a manner consistent with the clause's literal language, ignoring the industry's misleading presentation to state regulators over twenty years ago, and overlooking the apparent unfairness that such an interpretation would impose on policyholders who were charged rates that did not reflect the radical diminution in coverage contemplated by the insurance industry. So to construe the pollution-exclusion clause would, in this Court's view, violate this State's strong public policy requiring regulation of the insurance business in the public interest, and would reward the industry for its misrepresentation and nondisclosure to state regulatory authorities.

In a non-regulatory context, this Court has long recognized the doctrine that an insurer who misrepresents the coverage of, or the exclusions from, an insurance contract to the insured's detriment may be estopped from denying coverage on a risk not covered by the policy. In *Harr v. Allstate Insurance Co.*, 54 *N.J.* 287, 255 *A.*2d 208 (1969), the insured sought recovery for water damage to business merchandise stored in the basement of his residence. Although neither the homeowner's policy nor the fire policy issued by Allstate covered the loss, the insured contended that Allstate was estopped from denying coverage under the fire policy because of representations by its agent reasonably relied on by the insured. The record disclosed that before leaving for a trip to Florida the insured had inquired of Allstate's representative, knowing that his homeowner's policy did not cover his business equipment, whether he could obtain coverage for such equipment. Allstate's representative informed Harr that

Allstate "can cover you for $ 7500 and you are fully covered." Thereafter, Allstate issued Harr a fire insurance policy covering "merchandise in storage" but not affording coverage for damage caused by burst water pipes, a peril covered by Harr's homeowner's policy. While Harr was in Florida, a burst water pipe damaged the residence, personal property, and the stored equipment. Allstate's denial of coverage for the damaged equipment was sustained by the lower courts. Reversing, this Court held that

> where an insurer or its agent misrepresents, even though innocently, the coverage of an insurance contract, or the exclusions therefrom, to an insured before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The proposition is one of elementary and simple justice. By justifiably relying on the insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere. To reject this approach because a new contract is thereby made for the parties would be an unfortunate triumph of form over substance. The fact that the insurer has received no premium for the risk or peril as to which the loss ensued is no obstacle. Any additional premium due can be deducted from the amount of the loss. If the insurer is saddled with coverage it may not have intended or desired, it is of its own making, because of its responsibility for the acts and representations of its employees and agents.
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> [*Id.* at 306-07, 255 A.2d 208 (citations omitted).]

See also Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 *Ariz.* 383, 682 *P.*2d 388, 400 (1984) (allowing insured to raise issue of estoppel to establish coverage contrary to limitations in standard-form policy

when insurer's agent had represented that coverage was broader than that contained in policy); *Griggs v. Bertram*, 88 *N.J.* 347, 363-64, 443 *A.*2d 163 (1982) (insurer that failed to inform insured of potential disclaimer within reasonable time estopped from denying coverage on subsequent litigation against insured). *See generally* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 *Harv. L. Rev.* 961, 977-85 (1970) (supporting principle that policyholders can assert doctrine of estoppel to claim coverage contrary to policy provisions based on justifiable and detrimental reliance on insurer's representations).

Although we have not heretofore applied the estoppel doctrine in a regulatory context, its application to these circumstances is appropriate and compelling. A basic role of the Commissioner of Insurance is "to protect the interests of policy holders" and to assure that "insurance companies provide reasonable, equitable and fair treatment to the insuring public." *See In re N.J.A.C. 11:1-20*, 208 *N.J. Super.* 182, 189, 505 *A.*2d 177 (App. Div. 1986). In misrepresenting the effect of the pollution-exclusion clause to the Department of Insurance, the IRB misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.

An insurance doctrine closely related to "estoppel" holds that insurance contracts should be enforced to accord with the objectively-reasonable expectations of the insured even if the contract's technical provisions would not be found ambiguous by a sophisticated reader. For example, in *Gerhardt v. Continental Insurance Co.*, 48 *N.J.* 291, 225 A.2d 328 (1966), in determining that although the policy language was unambiguous, it was insufficiently clear to jus-

tify depriving the insured of her reasonable expectations of coverage, we observed:

> This quoted language was obscure on first reading to both counsel and the Court * * *.
>
> After the purpose of the quoted language is * * * explained it is understandable, but it seems highly unlikely that the ordinary insured would have so understood it on his or her own reading. As far as the plaintiff here was concerned, nowhere was there any straightforward and unconditional statement that the policy was not intended to protect the insured against a workmen's compensation claim by a residence employee injured at the insured's home.
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> [*Id.* at 299, 225 A.2d 328 (citation omitted).]

We explained the basis for the doctrine of "reasonable expectations" in *Sparks v. Saint Paul Insurance Co.*, 100 *N.J.* 325, 495 *A.*2d 406 (1985):

> The interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance. By traditional standards of contract law, the consent of both parties, based on an informed understanding of the terms and conditions of the contract, is rarely present in insurance contracts. W.D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power," 84 *Harv.L.Rev.* 529, 539-41 (1971); *R. Keeton, Insurance Law* 350-52 (1971). Because understanding is lacking, the consent necessary to sustain traditional contracts cannot be presumed to exist in most contracts of insurance. Such consent can be inferred only to the extent that the policy language conforms to public expectations and commercially reasonable standards. *See* W.D. Slawson, *supra*, 84 *Harv. L. Rev.* at 566;

> R. Keeton, *supra*, at 350-52. In instances in which the insurance contract is inconsistent with public expectations and commercially accepted standards, judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice.
>
> [*Id.* at 338, 495 *A.*2d 406.]

The observation that an insurance policy unambiguous to a sophisticated reader may be technically undecipherable to an average insured applies squarely to the standard CGL policy endorsed with the standard pollution-exclusion clause. A decade of litigation has illuminated the literal meaning of the clause and its relation to the definition of "occurrence," but that clarity of understanding was not prevalent in 1970 when the clause was submitted for regulatory approval. To the contrary, by virtue of the IRB "explanatory" memorandum, the common understanding of regulators undoubtedly was that the clause "clarified" but was consistent with the prior occurrence-based coverage. At most, the IRB's statement that the exclusion "clarifies this situation so as to avoid any question of intent" could have been understood to characterize the exclusion as denying coverage for the knowing discharge of pollutants, irrespective of whether damage had been expected or intended. As noted earlier, *supra* at 34-36, 629 *A.*2d at 850-851, the industry's public statements contemporaneous with the drafting and submission of the pollution-exclusion clause suggested that its overriding purpose was to deny coverage to intentional polluters. Because the pollution-exclusion clause, after regulatory approval, was added as an endorsement to most standard CGL policies, the typical commercial insured may have had little, if any, awareness that the terms of CGL coverage had been changed, much less any "objectively-reasonable expectation" of the scope of the new coverage, except to the extent of an assumption that unchanged premiums ordinarily would be consistent with a continuing level of

coverage. To the extent that in the early 1970s informed "reasonable expectations" of the scope of coverage of the pollution-exclusion clause existed, such expectations were those of state regulators that had reviewed the IRB memorandum and understood that "coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * * ." IRB explanatory memorandum, *supra* at 36, 629 *A.*2d at 851. We are fully persuaded that the "reasonable expectations" of the New Jersey insurance regulatory authorities should be imputed to those insureds to whom CGL policies with standard pollution-exclusion clauses were issued after the clause had been approved on the basis of the IRB memorandum.

Accordingly, we hold that notwithstanding the literal terms of the standard pollution-exclusion clause, that clause will be construed to provide coverage identical with that provided under the prior occurrence-based policy, except that the clause will be interpreted to preclude coverage in cases in which the *insured* intentionally discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected. We expressly limit our holding concerning the limited effect of the pollution-exclusion clause to cases in which the insured or an agent specifically authorized to act for the insured intentionally discharges a known pollutant. We disapprove of holdings such as *Powers Chemco, Inc. v. Federal Insurance Co.*, 74 *N.Y.*2d 910, 549 *N.Y.S.*2d 650, 548 *N.E.*2d 1301 (1989), holding that claims for remediation costs against the insured based on property damage caused by intentional discharges of hazardous waste by the insured's predecessor in title were ineligible for coverage under the pollution-exclusion clause because the former landowner had intentionally discharged pollutants. In our view, so restrictive an application of the pollution-exclusion clause is inconsistent with the IRB's explanatory memorandum and with the industry's stated purpose of restricting the availability

of pollution-caused damage coverage for those insureds who intentionally pollute the environment.

We add this additional observation. In declining to give effect to the literal provisions of the pollution-exclusion clause, we manifest no hostility to restrictive coverage provisions in standard-form insurance policies. Although intensively regulated, the insurance industry is entitled to reassess periodically the perils it chooses to insure and, subject to regulatory approval, to restrict coverage of risks in a manner consistent with its economic interests. Industry-wide determinations to restrict coverage of risks—particularly those that affect the public interest, such as the risk of damage from environmental pollution—must be fully and unambiguously disclosed to regulators and the public. In the case of the pollution-exclusion clause, the importance of full disclosure in 1970 is illustrated by the events of the ensuing two decades. Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 *U.S.C.A.* §§ 9601 to 9675 (CERCLA), and its state counterparts, joint and several liability for cleanup costs may be imposed retroactively and without regard to fault on a broad class of entities involved directly or indirectly in the process of disposal of hazardous substances. Estimated remediation costs range from 150 to 750 billion dollars. Reiter et al., *supra*, 59 *U. Cin. L. Rev.* at 1171. Industrial and governmental entities confronted with liability for remediation expenses, often based on hazardous-waste disposal that had occurred ten or twenty years earlier, invariably have turned to their CGL carriers for indemnification, only to be confronted with disclaimers of coverage in reliance on the pollution-exclusion clause.

Had the insurance industry candidly revealed the extent of the contraction in coverage intended by the pollution-exclusion clause, regulatory officials could have made informed judgments concerning the rate and coverage issues implicated by the clause, and both commercial and governmental insureds would have been aware that insurance

coverage for environmental pollution would be sharply restricted. Conceivably, commercial and governmental insureds would have taken action, either directly or through intervention by state regulatory authorities, to encourage the industry to provide broader coverage for pollution damage, even at increased rates, perhaps avoiding the litigation explosion that the pollution-exclusion clause has precipitated. Had full disclosure been made, we would not hesitate to enforce the pollution-exclusion clause as written, resolving nuances inherent in the meaning of "sudden" on a case-by-case basis. Not only did the insurance industry fail to disclose the intended effect of this significant exclusionary clause, it knowingly misstated its intended effect in the industry's submission of the clause to state Departments of Insurance. Having profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.

C. *Environmental Pollution and the Definition of "Occurrence."*

Irrespective of the effect of the "As Damages" language and the pollution-exclusion clause on Morton's claims for indemnification against its carriers, the ultimate issue remaining to be addressed is whether the events resulting in the property damage ordered to be remediated in the *Ventron* litigation constitute an "accident" or an "occurrence" as defined in the various CGL policies. As noted, *supra* at 10-11, 629 A.2d. at 836, the primary CGL policy in effect until October 1964 provided coverage for "all sums which the Insured shall become legally obligated to pay * * * for damages because of injury to or destruction of property * * * caused by accident," the term "accident" being undefined. Effective in October 1964, the policy was amended by substituting "resulting from an occurrence"

for the words "caused by accident," and defining "occurrence" as follows:

> The word "occurrence" as used in this endorsement means an unexpected event or happening which results in injury to or destruction of tangible property during the policy period, or a continuous or repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period provided the insured did not intend or anticipate that injury to or destruction of property would result * * *.

Effective October 1966, and continuing throughout the period germane to this litigation, the primary CGL policies covering Morton's predecessors defined "occurrence" as follows:

> "Occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

In reviewing the trial court's grant of summary judgment to the insurers on the claims for indemnification, the Appellate Division separately addressed the pre-1966 policy that provided coverage for damages "caused by accident," and the post-1966 policies providing coverage for damages "resulting from an occurrence." With respect to the "accident"-based policy, the Appellate Division correctly acknowledged that the trial court had focused improperly on the manner in which the injury had been caused and had erroneously concluded that the policy did not provide coverage for the unexpected result of a deliberate act. 266 N.J.Super. at 335, 629 A.2d at 914. Nevertheless, referring to the settled rule that a volitional act could qualify as an "accident" if the insured did not intend to cause harm or was not substantially certain that harm would occur, *see*

Broadwell, supra, 218 *N.J. Super.* at 533, 528 A.2d 76, the Appellate Division concluded that the trial court's error had been harmless because the "evidence was overwhelming that plaintiff's predecessors must have been substantially certain that such harm would occur * * * ." Id. 266 N.J.Super. at 336, 629 A.2d at 914.

In addressing the "occurrence"-based policies, the Appellate Division, without the benefit of this Court's decisions in *Voorhees v. Preferred Mutual Insurance Co.,* 128 *N.J.* 165, 607 *A.*2d 1255 (1992), and *SL Industries, Inc. v. American Motorists Insurance Co.,* 128 *N.J.* 188, 607 A.2d 1266 (1992), observed that the definition of "occurrence" was analogous to coverage provisions in other cases in which courts have determined that "the character of the act can be the basis of an inference that the insured intended the injury." 266 *N.J.Super.* at 330, 629 A.2d at 911. Relying primarily on *Atlantic Employers v. Tots & Toddlers,* 239 *N.J. Super.* 276, 282-83, 571 *A.*2d 300 (App. Div. 1990), *certif. denied,* 122 *N.J.* 147, 584 A.2d 218 (1990), a child-sex-abuse case, the Appellate Division, referring to Morton's predecessors, concluded that "[t]he intentional character of the act is the basis for the inference that the insured either intended or was manifestly indifferent to the prospect of injury." 266 *N.J.Super.* at 330, 629 A.2d at 911. In reaching that conclusion, however, the Appellate Division noted that the "substantial environmental pollution over a long period" together with the knowledge by Morton's predecessors that "the substance being discharged * * * was toxic and harmful" rendered unacceptable a conclusion that no harm had been expected. *Id.* at 332, 629 A.2d at 913.

Morton asserts that the Appellate Division's reliance on *Atlantic Employers, supra,* improperly equated the discharge of pollutants with child molestation as acts that could be deemed intentionally injurious as a matter of law. Morton contends that the Appellate Division improperly invoked an objective standard for determining whether

harm had been intended or expected under the "occurrence"-based policies, ignoring the long-standing principle that coverage exists for the unintended results of intentional acts.

We recently had occasion to address issues analogous to those raised by Morton, although in a different context, in *Voorhees* and *SL Industries*. In *Voorhees, supra*, 128 *N.J.* 165, 607 A.2d 1255, the insured under a homeowner's policy was sued on the basis of statements she had made at a public meeting questioning the competency of her child's teacher, the plaintiff alleging that she had sustained various injuries including extreme emotional distress. The homeowner's policy provided coverage for liability arising from bodily injury caused by an "occurrence," defined as an "accident," but excluded coverage for liability caused intentionally. *Id.* at 171, 607 A.2d 1255. The carrier disclaimed coverage, asserting that the claims were based on the insured's intentional act and that the complaint sought recovery for "personal" rather than "bodily" injury. After the underlying case was settled, Voorhees sued her carrier for damages based on its disclaimer of coverage. A divided panel of the Appellate Division, reversing the trial court, determined that the carrier had a duty to defend irrespective of whether the claim was based on an "occurrence," construing the complaint as alleging causes of action that would be covered under the term "bodily injury." 246 *N.J. Super.* 564, 570-73, 588 A.2d 417.

On appeal, we noted that the duty-to-defend clause was not triggered "absent a potentially-coverable occurrence," 128 *N.J.* at 180, 607 A.2d 1255, observing that the insurer had limited its coverage to occurrences that were accidental in order to avoid responsibility for covering insureds whose conduct was deliberately wrongful. *Ibid.* Writing for the Court, Justice Garibaldi adverted to the "careful balance" that we had struck between the public policy that "denies insurance indemnification for the civil consequences of wrong-doing," and the policy that favors com-

pensation of victims through insurance proceeds "to the extent that that compensation will not condone and encourage intentionally-wrongful conduct." *Id.* at 181, 607 A.2d 1255. The competing considerations were set forth in *Burd v. Sussex Mutual Insurance Co.*, 56 *N.J.* 383, 267 A.2d 7 (1970):

> The exclusion of intentional injury from coverage stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences. Pulling the other way is the public interest that the victim be compensated, and the victim's rights being derivative from the insured's, the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack. And the insured, in his own right, is also entitled to the maximum protection consistent with the public purpose the exclusion is intended to serve.
>
> [*Id.* at 398-99, 267 A.2d 7 (citations omitted).]

We held in *Voorhees* that "the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury," 128 *N.J.* at 183, 607 A.2d 1255, observing that an injury would be regarded as having been caused by an occurrence if the injury was unintended and unexpected, whether or not the act that caused the injury was intentional.

> That interpretation prevents those who intentionally cause harm from unjustly benefitting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.
>
> [*Ibid.*]

We also held in Voorhees that "[a]bsent exceptional circumstances that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure." *Id.* at 185, 607 A.2d 1255. We also noted that in cases involving "particularly reprehensible" conduct, "the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure. That objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind." *Id.* at 184, 607 A.2d 1255, (citing *Atlantic Employers, supra,* 239 *N.J. Super.* 276, 571 A.2d 300, the child-sex-abuse case, as example of factual setting in which intent to injure can be inferred on basis of objective conduct). Nevertheless, the Court concluded that the insured's statements, although intentional, had not been made under circumstances suggesting that injury to the teacher had been intended or expected, and also noting that the complaint's inclusion of an allegation of negligent infliction of emotional distress "presumes the absence of an intent to injure." *Id.* at 185, 607 A.2d 1255.

In *SL Industries, supra,* we confronted the related issue whether a general intent to cause injury that is inherent in a valid claim based on intentional fraud necessarily incorporates the intent to cause the specific resulting injury, emotional distress, or whether proof of a subjective intent to cause the specific injury is required. 128 *N.J.* at 209-13, 607 A.2d 1266. The suit underlying the coverage action in *SL Industries* included allegations by the insured's employee that he had been the victim of willful age discrimination in violation of the Age Discrimination in Employment Act, 29 *U.S.C.A.* §§ 621 to 634, as well as allegations of common-law fraud to the effect that he had been induced to retire by the false statement that his position was to be eliminated. After settling the underlying suit, the insured instituted a coverage action against its carrier, which the Law Division dismissed on summary

judgment. Reversing, the Appellate Division held that although coverage was not provided for intended harm, coverage would be provided for the unforeseen results of intentional conduct, remanding the case to the Law Division to determine whether the employee's emotional distress had been intended or expected. 248 *N.J.* Super. 458, 465-67, 591 A.2d 677.

On appeal, this Court also addressed the issue whether emotional distress caused by a fraudulent misrepresentation constituted intentional harm, noting preliminarily that "the intent element in fraud, consisting of the intent to induce reliance, constitutes a subjective intent to injure." 128 *N.J.* at 209, 607 A.2d 1266. We then framed the issue before us as "whether any intent to injure will render the resulting injury intentional, whether the wrongdoer must intend the *specific* injury that results, or whether there is some middle ground between the two approaches." *Ibid.*

After evaluating alternative theories, we endorsed the view expressed in *Prudential Property & Casualty Insurance Co. v. Karlinski*, 251 *N.J. Super.* 457, 464, 598 *A.*2d 918 (App. Div. 1991), which we summarized as follows:

> Assuming the wrongdoer subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was "accidental" and coverage will be provided.
>
> [128 *N.J.* at 212, 607 A.2d 1266.]

Accordingly, we affirmed that aspect of the Appellate Division's judgment remanding the case to the Law Division to determine whether the employee's emotional distress had been a probable outcome of the insured's general intent to injure and, if not, whether the insured subjectively

had intended to cause the employee's actual injuries. *Id.* at 212-13, 607 A.2d 1266.

In applying our holding in *Voorhees* to claims seeking coverage for property-damage caused by environmental pollution under occurrence-based CGL policies, we acknowledge the impracticality of adherence to the general rule that "we will look to the insured's subjective intent to determine intent to injure." *Voorhees, supra,* 128 *N.J.* at 185, 607 A.2d 1255. Although insureds may concede that pollutants—even known pollutants—had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected. Absent "smoking gun" testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in coverage litigation.

We noted in *Voorhees* that an alternative to proof of subjective intent to injure existed in those cases in which the insured's "actions are particularly reprehensible, [so that] the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure." 128 *N.J.* at 184, 607 A.2d 1255. We cited *Atlantic Employers, supra,* 239 *N.J. Super.* 276, 571 A.2d 300, a case in which the insured was sued for sexual abuse of children in a day-care center, as illustrative of conduct that was so inherently injurious as to warrant the conclusion that intent to injure could be presumed. *Id.* at 185, 607 A.2d 1255. We are unpersuaded that environmental-pollution litigation should generally be included in that category of cases, typified by *Atlantic Employers,* in which reprehensible conduct justifies a presumption that injury was intended. As the numerous cases involving interpretation of the pollution-exclusion clause demonstrate, see *supra* at 43-69, 629 A.2d at 855-870, insureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability for the harm caused by pollutant discharges. A general rule in environ-

mental-pollution coverage litigation that would permit intent to injure to be presumed simply on the basis of a knowing discharge of pollutants would be unjustified.

Instead, we hold that in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, "exceptional circumstances [exist] that objectively establish the insured's intent to injure." *Voorhees, supra,* 128 *N.J.* at 185, 607 A.2d 1255. Those circumstances include the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm. Notwithstanding the Appellate Division's reliance on *Atlantic Employers* to support its holding, 266 *N.J. Super.* at 324-325, 330, 333, 629 A.2d at 908-909, 911, 913, we are satisfied that the Appellate Division's conclusion that environmental injury had been intended or expected rested essentially on its evaluation of the record before the trial court, and not on the assumption that environmental-pollution cases involving intentional discharges of pollutants inherently warrant a presumption that any resultant damage was intended.

III

With respect to those policies that contain a standard pollution-exclusion clause, we hold that Morton is not entitled to indemnification for remediation costs imposed on its predecessors, because the conclusion is unavoidable that its predecessors had intentionally discharged known pollutants over a long and continuing period. As noted, we have determined to enforce the standard pollution-exclusion clause only to the extent of precluding coverage for an insured's intentional discharge of known pollutants. *Supra* at 70-80, 629 A.2d at 870-76. Putting to one side the

question whether Morton's predecessors intended or expected environmental damage, that they had intentionally discharged known pollutants into Berry's Creek for approximately twenty years is incontrovertible. The very first Department of Health memorandum in April 1956 characterizes the effluent as containing organic and inorganic mercury compounds, with the effluent described as flowing into an open ditch that discharges into Berry's Creek. Department of Health engineers, during visits to the plant in 1958 and 1959, had informed Berk officials that the effluent discharging from the plant was "unacceptable by reason of a high suspended solids content and a high [Biological Oxygen Demand]." A Berk official had reported to a State engineer in 1958 that the Company unsuccessfully had attempted to persuade the Wood Ridge Sewer Authority to accept its wastes, and the engineer had admonished the official that no progress in alleviating the pollution problem had been made in the previous two years. Reports in 1959 and 1960 by a consulting engineer retained by Berk revealed that the plant's effluent contained "deleterious characteristics." Reports of inspections by State engineers in February and December 1960 revealed that Berk's emissions continued to be untreated and "unacceptable" for discharge into Berry's Creek.

No action toward alleviating the "unacceptable" quality of its emissions was undertaken until 1964 when Berk agreed with Department of Health officials to implement treatment facilities recommended by a consulting engineer. Notwithstanding that agreement, the company apparently disregarded its commitment, taking no action to remediate the discharge of pollutants until early in 1970, after intervention by the federal Environmental Protection Agency. By then, company officials had acknowledged that the plant was discharging an average of 4.2 pounds of mercury per day.

The company's knowledge that its discharges into Berry's Creek contained unacceptable emissions, including or-

ganic and inorganic mercury compounds, combined with its evasive conduct from 1956 to 1970, involving a series of unfulfilled representations and undertakings to remediate the quality of its emissions, demonstrates beyond question that it regularly and intentionally had discharged known pollutants during that period. Accordingly, no coverage is provided under policies containing the standard pollution-exclusion clause. In view of our disposition concerning the question of a covered "occurrence," we need not and do not address coverage issues related to non-standard pollution-exclusion clauses.

Before addressing specifically the question whether the Appellate Division properly concluded that Morton's predecessors had intended or expected environmental harm as a matter of law, we consider preliminarily two arguments advanced by Morton to demonstrate the inappropriateness of summary judgment on that issue. First, Morton contends that because the trial court in the *Ventron* litigation concluded that the trial proofs had not established that Berk and Wood Ridge had intended "to pollute the waters of the state," the trial court in the coverage proceeding could not properly conclude, without a trial, that an intention or expectation to cause environmental harm had been established as a matter of law. A related point pressed by Morton is that the Appellate Division misconceived its cross-motion for summary judgment as an acknowledgment that no triable issue of fact existed with respect to the intent or expectation of Morton's predecessors. Morton asserts that its cross-motion for summary judgment was based on its view that the determination of the *Ventron* trial court on the issue of intent to cause damage should have been binding in this proceeding.

We first note the context of the trial court's determination in *Ventron*. That court had previously ruled that Morton's predecessors were liable for remediation of damage to Berry's Creek under a statute originally enacted in 1937, *N.J.S.A.* 23:5-28, as well as under the New Jersey

Water Quality Improvement Act of 1971, *N.J.S.A.* 58:10-23.2, -23.4. The court had also ruled that those statutory violations constituted proof that the defendants were liable for cleanup costs under a statutory-nuisance theory. Thereafter, addressing the issue of common-law nuisance, the *Ventron* trial court concluded that strict liability for nuisance should be imposed on the basis of the defendants' ultra-hazardous conduct in discharging pollutants from their plant. Before reaching that conclusion, the court considered but rejected the rationale that common-law nuisance could be premised on a finding that defendants had intended to cause environmental harm:

> What is meant is that the actor acts for the purpose of causing the invasion of another's interest or knows that such an invasion is resulting or is substantially likely to result from those acts. Surely Berk and WRCC intended to and volitionally did manufacture mercury compounds and dumped waste on the Velsicol property. However, the court cannot find that the acts were done with the intent to pollute the waters of the State with the knowledge that such on invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

The *Ventron* court's observation is dictum, being unnecessary to its conclusion that common-law nuisance liability had been established on the basis of the defendants' ultra-hazardous discharges of pollutants. Moreover, it focused on the question whether intentional injury sufficient to constitute a common-law nuisance had been proved, an inquiry different in substance and in context from whether injury is intended or expected under the provisions of an "occurrence"-based CGL policy. Finally, we are fully in accord with the Appellate Division's conclusion that under the collateral-estoppel doctrine the *Ventron* court's determination would not be binding in subsequent coverage lit-

igation involving different parties. *See State v. Gonzalez*, 75 *N.J.* 181, 186, 380 *A.*2d 1128 (1977); *Mazzilli v. Accident & Casualty Ins. Co.*, 26 *N.J.* 307, 313-314, 139 *A.*2d 741 (1958). The insurers participating in this coverage proceeding are clearly entitled to litigate for the first time the question whether a covered occurrence has been established. *See Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.*, 98 *N.J.* 18, 24-25, 483 *A.*2d 402 (1984); *Burd, supra*, 56 *N.J.* at 394, 267 A.2d 7.

Moreover, irrespective of the basis on which Morton filed its motion for summary judgment, the trial court in this proceeding had before it extensive documentary and testimonial evidence from the *Ventron* litigation sufficient to permit an informed determination about whether material factual issues remained in dispute. In view of our holding concerning the manner in which the insured's intent or expectation of injury must be proved in environmental-coverage litigation, *supra* at 85-86, 629 A.2d 879-880, we find unpersuasive Morton's contentions that material factual issues remained in dispute or that a plenary trial was required to enhance further the record before the trial court.

Turning to the question whether environmental injury was intended or expected, we first observe that although the magnitude of the damage to Berry's Creek and the surrounding areas may exceed any intention or expectation attributable to Morton's predecessors, we do not consider that differences in harm relating to the severity of environmental damage give rise to a finding of "improbability" of harm that invokes the need for evidence of subjective intent. *SL Indus., supra*, 128 *N.J.* at 212, 607 A.2d 1266. Whether Morton's predecessors anticipated that discharges of untreated effluent on the plant site and into Berry's Creek for more than forty years would cause environmental harm of the severity described in *Ventron, supra*, 94 *N.J.* at 481-82, 468 A.2d 150, hardly demonstrates that the extent of the injury was "improbable." The holding in

SL Industries was based on the Appellate Division's ruling in *Karlinski, supra,* 251 *N.J.* Super. at 464, 598 A.2d 918, that in a coverage action arising from a fight between two young teenagers in which one sustained a broken hip, a factual issue of subjective intent was presented because of the inherent improbability that the skirmish would result in a hip fracture. *Id.* at 464-46, 598 A.2d 918. No such inherent "improbability" can be ascribed to the environmental damage attributable to Morton's predecessors.

In determining whether in the context of this record the trial court properly concluded, as a matter of law, that Morton's predecessors had intended or expected environmental injury, we focus on those factors that we previously have identified to be significant. See *supra* at 86, 629 A.2d at 880. Although the documentary evidence establishes that the discharges were detected as early as 1956 and continued until 1974, the record discloses that Berk commenced operating the mercury-processing plant in 1929. Thus, we can infer that the discharge of pollutants from the plant continued over a period of at least eighteen years and perhaps as long as forty-five years. The conclusion is inescapable that from as early as 1956, when the unacceptable quality of its emissions first was brought to Berk's attention, the discharges of pollutants thereafter occurred intentionally. The intentional nature of the discharges is confirmed by Berk's and Wood Ridge's continued evasion of and postponements of compliance with the repeated demands by Department of Health engineers that the discharges into Berry's Creek cease or that the company install adequate treatment facilities. Knowledge that its discharges were likely to cause harm was also inferable from the regular reports submitted and demands for compliance asserted by state engineers, which Berk and Wood Ridge consistently ignored. Although we might fault the Department of Health officials for not acting on threats to institute enforcement proceedings, we cannot accurately assess whether effective statutory- or regulatory-enforce-

ment mechanisms were then available. But the record fairly reflects a pattern of "stonewalling" on the part of Berk and Wood Ridge, characterized by promises of compliance that consistently were unfulfilled.

With respect to the extent of Berk's knowledge concerning the hazards presented by its untreated effluent, Berk was informed in 1956 that its effluent included organic- and inorganic-mercury compounds. A 1959 Department of Health memorandum reflected awareness by Berk officials that "the removal of the mercurial compounds will be a necessity." Berk officials were regularly informed, both by state engineers and by reports submitted by their own consultants, that its effluent was unacceptable for discharge into Berry's Creek because of its high suspended solids content and its high biological oxygen demand, characteristics that almost certainly conveyed to Berk's engineers the risk of depletion of the oxygen content of Berry's Creek, which would affect the Creek's capacity to accommodate wildlife. Hence, Berk's subjective knowledge that environmental harm was an inevitable result of its discharges was fairly inferable as early as the mid-1950s.

In February 1964, State officials intensified their efforts to compel Wood Ridge to install treatment facilities, noting in correspondence that one year had elapsed since the company had represented that it had retained consulting engineers to resolve its pollution problem. In response, Wood Ridge forwarded to Department of Health officials a report concerning proposed industrial-waste-treatment facilities. Based on that report, State officials reached agreement with Wood Ridge in August 1964 that the company would proceed with final plans for construction of treatment facilities consistent with those recommended by its consulting engineers and would submit those plans for approval by the Department of Health. Although further correspondence ensued, Wood Ridge failed to comply with its undertaking to submit plans for a treatment facility to State officials. The record reveals that almost two years

after its agreement with State officials to proceed with final plans for a treatment facility, Wood Ridge and its consulting engineers had not determined the most suitable method for treating Wood Ridge's waste. A letter from Edward G. Grich, Inc., dated March 31, 1966, to Wood Ridge's Vice President, states in part:

> Numerous surveys of the characteristics of the waste waters resulting from the production of these chemicals have revealed the presence of *deleterious conditions in terms of suitability for stream discharge.* These include adverse ph intensity level (decidedly acidic or decidedly alkaline); high concentrations of alkalinity or acidity; high level of turbidity and color; excessive solids concentrations; high concentrations of chorides, sulfates and all forms of nitrogen; the decided presence of interfering substances in the determination of chemical oxygen demand and B.O.D., and the presence of formaldahyde and a chemical odor.
>
> Many varied methods of treatment, designed to eliminate the deleterious conditions noted, have been investigated. In general, the methods employed were of a physical and/or chemical nature since the raw waste, as produced, would not be amenable to biological treatment methods.
>
> The treatment processes employed included neutralization, settling, chemical flocculation, filtration, aeration and activated carbon absorption in varied combinations and orders of usage.
>
> • • • •
>
> Additional studies are anticipated that may include further activated carbon studies.
>
> [Emphasis added.]

The inescapable inference, based on the correspondence between Wood Ridge and State officials, and on the re-

ports of its own engineers, is that Wood Ridge was fully cognizant that its effluent was unsuitable for stream discharge and that environmental damage inevitably would occur if its untreated effluent continued to flow into Berry Creek.

By 1970, Wood Ridge's knowledge that environmental harm was occurring and would continue to occur was beyond question, as evidenced by an inter-company memorandum approving an expenditure for improved effluent treatment. That document acknowledged that

> [w]e are discharging mercury at a rate which we cannot measure precisely, but which has been estimated by the F.W.Q.A. [Federal Water Quality Administration] at 4.2 lbs./day (55 GPM total discharge, averaged over 24 hours, 7 PPM mercury content). * * * While the current furor over mercury pollution undoubtedly contains much exaggeration and misinformation, it is unquestionably a toxic substance, and as such we are under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes.

Little insight into the issue before us is gained from comparison with analogous cases, because specific facts and circumstances inevitably determine whether courts conclude that proof of an occurrence has been established. Many courts have concluded under comparable circumstances that continued discharges of pollutants over a prolonged period, combined with knowledge of the pollutants' deleterious qualities, is sufficient to establish an intention or expectation that environmental damage will occur. *See Fireman's Fund Ins. Cos., supra,* 750 *F. Supp.* at 1350-51, 1353-56; *Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co.*, 716 *F. Supp.* 1541, 1543 (D. Md. 1989); *Neville Chem. Co.*, 650 *F. Supp.* at 932-33; *County of Broome v. Aetna Casualty & Sur. Co.*, 146 *A.D.*2d 337, 540 *N.Y.S.*2d 620, 622-23 (App. Div.), *appeal denied*, 547 *N.E.*2d 103 (1989).

The relevant cases are collected in Chesler et al., *supra*, 18 *Rutgers L.J.*, which contains this overview of the decisional law:

> The courts frequently look to the quality of the underlying conduct where constructive intent is not readily apparent. If the insured takes reasonable precautions to prevent possible damage or acts promptly to remedy and prevent the reoccurrence of actual damage after its discovery, the courts have been inclined to find that the damage is unintentional and caused by accident. Conversely, coverage is generally denied when an insured takes no steps to avoid conduct which has a high risk of causing damage. For example, insureds in cases involving continuing nuisances have often been denied coverage because they were informed of, or knew of, the damage that they were causing but failed to take any remedial or preventive measures.
>
> [*Id.* at 23 (footnote omitted).]

We are thoroughly persuaded that summary judgment was properly granted, there being no material disputed facts concerning whether Morton's predecessors had *expected* to cause environmental damage to Berry's Creek and the surrounding area. Without determining that such damage was intended, we find inescapable the conclusion that damage qualitatively comparable to that found to exist in the *Ventron* litigation must have been anticipated by Morton's predecessors on the basis of their prolonged knowledge of and avoidance of compliance with complaints by regulatory officials that the company was discharging unacceptable emissions, including mercury compounds, into Berry's Creek. Based on that conclusion, we concur with both the trial court's and Appellate Division's determination that as a matter of law the property damage to Berry's Creek and the surrounding area was not caused by an "occurrence" within the meaning of the term in the

various CGL policies. We agree with the Appellate Division's observation that the trial court "would have ignored reality to conclude that plaintiff's predecessors did not know that the mercury and its effluent was harmful to the land over which it coursed and the waters into which it fell." 266 *N.J. Super.* at 334, 629 A.2d at 913.

Finally, we reject Norton's contention that certain of its insurers breached their duty to defend its predecessors in the *Ventron* litigation, asserting that the duty to defend is broader than the duty of indemnification, and observing that at least some of the allegations set forth in the *Ventron* complaint were within the policies' coverage obligations. The Appellate Division addressed those contentions, concluding that this Court's decisions in *Hartford Accident & Indemnity, supra,* 98 *N.J.* at 24-25, 483 A.2d 402, and *Burd, supra,* 56 *N.J.* at 388-390, 267 A.2d 7, were controlling and dispositive of Morton's contentions. *N.J. Super.* at 37-42, 629 A.2d at 852-855. We are fully in accord with the Appellate Division's determination of the duty-to-defend issue.

IV

The judgment of the Appellate Division is affirmed. No costs.

For Affirmance—Chief Justice Wilentz and Justices Handler, Pollock, and O'Hern.

Opposed—None.



APPENDIX B
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

266 N.J. Super. 300

MORTON INTERNATIONAL, INC., successor to Morton Thiokol, Inc., now named Thiokol Corporation,
Plaintiff-Appellant, Cross-Respondent,
v.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,
Defendant-Respondent, Cross-Appellant,
and
LIBERTY MUTUAL INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, FIRST STATE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, UNDERWRITERS AT LLOYDS, LONDON,
Defendants-Respondents,
and
AETNA CASUALTY & SURETY COMPANY, ET. AL,
Defendants.

May 30, 1991, Argued

October 2, 1991, Decided

COUNSEL: George F. Kugler argued the cause for appellant Morton International Inc. (Archer & Greiner, attorneys; Thomas C. Hill, Taft, Stettinius & Hollister, of counsel; Edward C. Laird and Deborah H. Simon on the brief).

Elliott Abrutyn, argued the cause for respondent General Accident Insurance Company of America (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; Timothy Saia, on the brief).

John G. McAndrews argued the cause for Certain Underwriters at Lloyds and Certain London Market Insurance Companies (Ronca, McDonald & Hanley, attorneys; Mr. McAndrews and Henry Lee, Kathleen B. Browne, Nancy N. Sipp, Mendes & Mount of the New York bar, of counsel and on the brief).

William S. Wachenfeld argued the cause for defendant-respondent, Affiliated FM Insurance Company (Priestley, McGuirl & Wachenfeld, attorneys; Siff, Rosen & Parker, and DeCotiis & Pinto, attorneys for respondent, First State Insurance Company; Louis G. Adolfsen and James A. Farber, on the joint brief).

Charles W. Miller, III, argued the cause for respondent American Home Assurance Company (Golden, Rothschild, Spagnola & DiFazio, attorneys).

Paul R. Koepff argued the cause for respondent Insurance Company of North America (Mudge, Rose, Guthrie, Alexander & Ferdon, attorneys).

John C. Sullivan argued the cause for respondent Liberty Mutual Insurance Company (Manta and Welge, attorneys).

Smith, Stratton, Wise, Heher & Brennan, counsel for Amicus Curiae Insurance Environmental Litigation Association (Thomas W. Brunner, Marilyn E. Kerst, Carol Barthel, Wiley, Rein & Fielding, of counsel; Wendy L. Mager on the brief).

Haskell & Perrin, and Chasan, Leyner, Tarrant, Loftis & Lamparello, attorneys for respondent Continental Casualty Company (James Kirk Perrin, Daniel P. Caswell, Marsha Kay Ross, of counsel and on the brief).

Before Judges King, R.S. Cohen and Stern.

The opinion of the court was delivered by KING, P.J.A.D.

This case is another episode in a long history of litigation which began in 1976 when the State Department of Environmental Protection (DEP) instituted suit against Ventron Corporation, and others, alleging that a mercury processing facility located on its premises was polluting Berry's Creek in Bergen County. The DEP prevailed and Ventron was held strictly liable for clean-up costs in a decision affirmed by the this court and affirmed, as modified, by the Supreme Court. *DEP v. Ventron,* 182 *N.J. Super.* 210, 440 A.2d 455 (App. Div. 1981), *aff'd as modified,* 94 *N.J.* 473, 468 A.2d 150 (1983). Subsequent purchasers of the contaminated property, Robert and Rita Wolf (the Wolfs), were successful in their crossclaim in that litigation and obtained a judgment because Ventron was guilty of fraudulent nondisclosure of the property's polluted condition. *See* 94 N.J. at 503-504, 468 A.2d 150.

The nominal plaintiff here, Morton International, Inc., (Morton or plaintiff) is the successor by acquisition to the rights of Ventron. When the *Ventron* complaint first was filed, all of the insurers of the owners of the contaminated property disclaimed coverage and refused to defend the action. After the Supreme Court's decision in 1983, Morton filed this declaratory judgment action in the Chancery Division seeking indemnity for remediation expenses and recoupment of the costs incurred in defending the suit brought by the DEP and the cross claim asserted by the Wolfs. Twenty-one insurance companies were named in this declaratory judgment action. Partial summary judgment was granted to all defendants with respect to their obligation to defend and indemnify Morton on the cross claim by the Wolfs. Cross-motions for summary judgment on the remaining issues were filed by plaintiff and the defendants which resulted in a ruling that only General

Accident Insurance Company of America (General Accident) was liable and only for part of Morton's costs in defending the DEP suit but that no defendant had a duty to indemnify Morton with respect to the claims made in the *Ventron* case. Judge Huot, the Law Division judge who granted the summary judgment, ordered a trial to establish the reasonable costs due for defense of the *Ventron* case. A trial was held before Judge Lesemann, and Morton was awarded judgment against General Accident for part of the *Ventron* case defense costs ($ 100,420.07) and attorneys' fees ($ 40,000) for successfully prosecuting the "cost of defense" trial. *See R.* 4:42-9(a)(6). The full costs of defense of the *Ventron* case were in excess of $ 1 million. Costs of remediation of environmental damage are yet undetermined.

Morton now appeals from the ruling dismissing its indemnity claims and from the claimed inadequate amount of the cost of the defense award contending that: (1) genuine issues of material fact were in dispute; (2) the judge erred in deciding as a matter of law and fact that the damages resulting from the mercury contamination were not caused by "an accident" within the meaning of the insurance policies; (3) the judge improperly construed the record and the law with respect to "occurrence" as defined in the insurance policies; (4) damage resulting from a covered "occurrence" took place after the plant closed; (5) the judge erroneously failed to order reimbursement of the full cost of defending the Ventron action and (6) the court abused its discretion in restricting the scope of discovery. General Accident's cross-appeal challenges Judge Huot's determination that it had any duty to defend Morton in the *Ventron* action.

On appeal from the rulings on the motions and cross-motion for summary judgment, *R.* 4:46-2, we affirm the judgment concluding that the insurers had no duty to indemnify Morton. We reverse that part of the judgment which concludes that General Accident had a partial duty

to defend Morton and we vacate the award of counsel fees in Morton's favor.

The facts pertinent to decision were presented in various forms to Judge Huot on the cross-motions for summary judgment. This included portions of the trial testimony and documentary evidence presented at the initial liability trial, *DEP v. Ventron*, before Judge Lester. Documents relevant to the various coverages were before Judge Huot and were not in dispute. The focus of the dispute in the Chancery Division was the inferences and conclusions to be drawn from these facts in the stipulated record. This suit was brought by Morton in the Chancery Division without a demand for a jury. Under the circumstances we see no practical difference between an adjudication at a bench trial or on this stipulated record on cross-motions for summary judgment. The decision was essentially a legal one for the judge.

This is the pertinent information about the insurance coverage. General Accident, Reserve and Liberty Mutual provided primary general liability insurance coverage for plaintiff between 1961 and 1976. General Accident insured plaintiff for the longest period of time, between 1961 and 1972. Reserve insured plaintiff for about the next two years; Liberty Mutual, for about one year. The remaining defendant insurance companies (London Market, American Home, Continental Casualty, INA, First State and FM Affiliated) provided excess coverage.

Although Judge Huot's opinion states that, chronologically, the first primary policy was issued by General Accident in 1964, the insurance coverage chart supplied by plaintiff in its appendix indicates that Continental Casualty actually provided the first primary coverage in 1960 and General Accident began its primary coverage in the last quarter of 1960 to the last quarter of 1971. Due to General Accident's long-term primary coverage, the focus of the

judge's opinion was on the provisions of General Accident's policy.

As noted by Judge Huot, neither General Accident nor Morton was able to produce either the original or a copy of the insurance contract in existence at that time. Rather, sample policy forms were submitted and accepted by all parties as accurate for purposes of the cross-motions for summary judgment. A form dated "7/64" indicated that with respect to property damage liability, except involving an automobile, General Accident agreed "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay . . . because of injury to or destruction of property . . . caused by accident." The coverage applied only to "occurrences or accidents" which happened during the policy period and required that written notice be given to the company "as soon as practicable . . . in the event of an accident or occurrence. Similarly, the insured was required to "immediately forward to the company" any process served upon the insured if a claim was brought or suit was instituted. The policy, however, did not define the term "accident."

In subsequent policies, at least after 1964, the policy language was amended to delete the phrase "caused by accident" in that section which defined the company's non-automobile property damage liability and to substitute the words "resulting from an occurrence." An occurrence was then defined as

> . . . An unexpected event or happening which results in injury to or destruction of tangible property during the policy period, or a continuous and repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period, provided the insured did not intend or anticipate that injury to or destruction of property would result. All damages arising out of such exposure to substantially

> the same general conditions shall be considered as arising out of one occurrence.

By 1966 occurrence had a new definition. The term was defined to mean

> . . . An accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

General Accident's description of the scope of its liability and definition of occurrence is substantially the same as those set out in the other excess policies covering plaintiff during the pertinent time period. Likewise, all of the insurance policies imposed upon plaintiff the duty to provide written notice in the event of an accident or an occurrence "as soon as practicable." Although General Accident's policy did not, several of the defendant insurers policies contained pollution exclusions which would not provide coverage for bodily injury or property damage arising out of contamination or pollution unless it was the result of an accident.

By letter dated April 15, 1976 plaintiff directed its insurance broker, Marsh & McLennan, Inc., to notify all of its insurers that it had been served with the complaint and cross claim. Relying upon the pollution exclusions in its policies covering plaintiff, Affiliated F.M. denied coverage. Five days later Liberty Mutual denied coverage, relying on its pollution exclusion and maintaining that no covered occurrence had taken place. On June 3, 1976 Reserve denied coverage asserting that no covered occurrence took place, and relied on the existence of the pollution exclusion and an exclusion for liability based upon a willful violation of public law. General Accident denied coverage by letter dated April 12, 1977 on the grounds that the claim did not fall within the policy definition of either occurrence or property damage. In May 1979 Re-

serve was declared insolvent and ordered liquidated by an Illinois court.

This is the factual background. F.W. Berk & Co. (Berk) owned and operated a mercury processing plant from 1929 to 1960 on a 40-acre tract west of Berry's Creek in Bergen County. During that time Berk dumped untreated waste material on the property resulting in mercury-laden effluent draining on the tract. *DEP v. Ventron, supra,* 94 *N.J.* at 483 468 A.2d 150. Velsicol Chemical Corporation (Velsicol) formed and capitalized Wood Ridge Chemical Corporation (Wood Ridge) as its wholly-owned subsidiary in 1960. Wood Ridge then purchased Berk's assets, including the 40-acre tract. From 1960 to 1974 Wood Ridge operated the mercury processing plant. In 1967 Wood Ridge declared a land dividend of 33 acres, subdivided from the 40-acre tract, to its parent corporation, Velsicol. *DEP v. Ventron Corp., supra,* 182 *N.J. Super.* at 217, 440 A.2d 455. Velsicol continued to permit Wood Ridge to dump untreated waste material on the 33-acre tract. 94 *N.J.* at 484, 468 A.2d 150. Velsicol remained the owner of the 33-acre tract. In 1968, however, it sold all the capital stock of Wood Ridge to Ventron Corporation (Ventron). 182 *N.J. Super.* at 217, 440 A.2d 455. After Ventron acquired the plant, it began to consider a program of treatment for plant wastes. Up to that point, the waste routinely coursed over the land through open drainage ditches. In March 1968, Ventron hired the firm of Metcalf & Eddy to study the effects of mercury on the land. Three months later Ventron constructed a weir to aid in monitoring the effluent. 94 *N.J.* at 484, 468 A.2d 150.

The DEP monitoring of the effluent started in the mid-1960s. At that time the DEP took no action against Wood Ridge. In 1970, however, the contamination at Berry's Creek came to the attention of the United States Environmental Protection Agency (EPA) which tested Wood Ridge's waste water. The tests showed that the effluent deposited at least two to four pounds of mercury into

Berry's Creek each day. Later in 1970, Wood Ridge installed a waste treatment system that abated, but did not completely halt, the flow of mercury into the creek. The plant continued to operate until 1974 when Wood Ridge merged into Ventron. Ventron then terminated the plant operations and sold the movable operating assets to Troy Chemical Company, an entity not involved in these proceedings. *Id.* at 484-485, 468 A.2d 150.

In February 1974 Wood Ridge gave a commercial real estate developer, Robert Wolf, an option to purchase the 7.1-acre tract on which the plant was located. In May of 1974 Ventron conveyed the tract to the Robert and Rita Wolf. The Wolfs planned to demolish the plant and construct a warehousing facility. In the course of the demolition, the mercury-contaminated water was used to wet down the structures and was allowed to run into the creek. When the DEP became aware of the situation, it ordered the demolition to stop, pending adequate removal or containment of the contamination. The Wolfs implemented a containment plan other than the one proposed by the DEP and proceeded with the project, ultimately constructing the warehouses. *Id.* at 485, 468 A.2d 150. The DEP instituted suit in March 1976. *Ibid.*

After a 55-day trial before Judge Lester, the defendants Berk, Wood Ridge, Velsicol and Ventron were held liable for damages caused by the creation of a public nuisance and the conduct of an abnormally dangerous activity. Ventron was also held liable to the Wolfs for fraudulently concealing material facts with respect to the pollution of the property it had sold to them—determinations later upheld by our Supreme Court. *Id.* at 493; 504, 468 A.2d 150.

The Supreme Court summarized this routine discharge of toxic chemicals at the site by Morton's predecessors over five decades in this way:

> Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury.

> For a stretch of several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. The waters of the creek are contaminated by the compound methyl mercury, which continues to be released as the mercury interacts with other elements. Due to depleted oxygen levels, fish no longer inhabit Berry's Creek, but are present only when swept in by the tide and, thus, irreversibly toxified.
>
> The contamination at Berry's Creek results from mercury processing operations carried on at the site for almost fifty years. [94 *N.J.* at 481-482, 468 A.2d 150].

The record before Judge Huot demonstrated that as early as 1956 plaintiff's predecessor was informed that the effluent from the mercury processing plant contained an unacceptable level of pollutants. A report filed by two senior State Health Department public health engineers on April 9, 1956 detailed the results of their inspection of the property. These inspectors found that the plant consumed 60,000 gallons of water per day, about 90% of which was used for cooling purposes. Industrial wastes were produced from three buildings and consisted mostly of cooling water which had a high solid content, mainly insoluble dimethylcithiocarbonates which are organic and inorganic mercury compounds. The waste passed through a sedimentation tank from which the settled solids were recovered and reprocessed. The effluents from the settling tanks combined into a private sewer which discharged into an open ditch about 1200 feet from the plant, which in turn discharged the effluent into Berry's Creek at a point 2500 feet from the plant. Both public health engineers concluded that the combined effluent from the plant had an unacceptably high level of suspended solids and that the settling tank serving the effluent from one of the buildings was not large enough.

On December 2, 1958 one of the public health engineers, John Wilford, again visited the property "to ascertain the current status of their program for the treatment or disposal of their industrial wastes in order to eliminate pollution of Berry's Creek." He reported that the company had not been successful in persuading the Wood-Ridge Sewage Treatment Plant to accept plaintiff's wastes. Wilford made an inquiry about having a large settling tank constructed with an outfall to Berry's Creek. Nothing about the processing at the plant had changed. Wilford explained to the company's vice-president that a settling tank would not, itself, reduce the pollution to acceptable limits and that if the company intended to continue discharging effluent into Berry's Creek it would have to submit plans and specifications to the Department of Health for approval. Wilford admonished the corporate official "that as this matter has been brought to [his] attention over two years ago, this department has a right to expect some appreciable progress toward the elimination of this problem." A four-point course of action was outlined to the company to which its vice-president agreed to comply. By March 17, 1959, however, it was clear to Wilford the company had made no progress "toward eliminating the polluting industrial waste therefrom from Berry's Creek." According to Wilford, the company was "cognizant" that its wastes contained mercury compounds which had to be removed.

In September 1959 and again in February 1960 Edward Griche, Inc. conducted an investigation into the nature of the waste emitted by the plant and the type of treatment which would clean the effluent. Both reports showed that the effluent from the processing plant contained many "deleterious characteristics" which included high suspended solids concentration. The report explored several treatment methods, some of which had proven to be highly successful and relatively cheap.

The State Department of Health again inspected the premises on February 4, 1960 taking samples of the industrial waste effluent for the purpose of determining "the current pollutional potential of the wastes." The written report which issued after that inspection showed that the "pollutional aspect" of the company's wastes first came to the attention of the State Department of Health in 1956. Although the report indicates that the company was "very cooperative" and "desirous of rectifying the present pollution," it had yet to decide what type of treatment facility to install and was unable to negotiate for waste disposal with the Borough of Wood-Ridge. Samples of the effluent were taken from three buildings on the premises with a report noting that "no treatment as such is afforded the industrial wastes." The conclusion of this report, as in an earlier report, stated "the combined industrial wastes effluent from S.W. Berk & Company is unacceptable for discharge into Berry's Creek." The report warned that the decision as to the type of waste treatment to be effected had been under consideration for several years; the author threatened legal action to secure compliance with the pertinent statutes.

By March 22, 1960 the company knew that the municipal sewerage system would not be able to handle its wastes, even with pretreatment. A letter from the company to the Department of Health indicated, however, that the company was seeking "professional help on design of a treatment plant." By May 1960 it appeared that Velsicol would purchase Berk's property and assets. Velsicol was informed of the State Department of Health's inspection report of February 1960 and was told that Berk had been "planning to make certain installations to reduce the amount of pollution resulting from its operations. . . ." The sale was completed and the company's name changed to Wood-Ridge Chemical Corporation in July 1960. The State Department of Health again inspected the premises in August 1960 and issued a written report which noted

that, despite the name change, "the official personnel remain the same as do also the chief production processes. At the time of this inspection, however, the plant was closed with full production expected to resume by October. Consequently, no sampling of waste was possible and the report merely noted that all production units produced wastes which flowed through a series of settling basins and united in a common ditch leading to Berry's Creek just below the outfall of the Wood-Ridge Sewerage Treatment Plant. Settling was the only treatment of the waste provided and it was observed that some of the settling basins were in need of cleaning. Again, the company represented to department officials that it was "now planning to construct its own treatment devices."

The plant was again inspected on December 5, 1960. The department's analysis of the plant's effluents indicated "a deleterious waste due chiefly to its high turbidity, suspended solids and ether soluble content." The effluent sample taken during the December 1960 visit was removed from a 5-foot deep, 40-foot square lagoon which had recently been excavated behind the industrial property. That lagoon received all the industrial waste effluents from the plant buildings and acted as an additional settling tank with an average detention period of about two days. The lagoon effluent emptied into Berry's Creek through an underground storm drain pipe. The report concluded with the suggestion that the company proceed with its plans to install additional waste treatment equipment on the premises in order to provide a nonpolluting final effluent.

In February 1964 the State's supervising engineer for the stream pollution control program wrote to the corporation's vice-president observing that a year prior the company informed the State Department of Health that it had contracted with consulting engineers to design suitable industrial waste treatment facilities to treat the lagoon effluent. The State complained that it received no engineering studies or proposals with respect to treatment fa-

cilities. Cautioning that the lagoon was nothing more than a temporary or preliminary step leading to treatability studies on the plant's effluents, Wood-Ridge Chemical was directed to advise the State of its treatment program status and when completion of a satisfactory facility would occur. In response, the company forwarded a "report on industrial waste treatment facilities, Wood-Ridge Chemical Corporation," authored by Clinton Bogert Associates, Consulting Engineers. Representatives from the company met with State Board of Health officials on August 5, 1964. At that time they reached an agreement in which the company was immediately to authorize final planning of new plant sewers and facilities for the collection and treatment of industrial wastes and to submit them to the department for approval within the next several weeks. These treatment facilities would be similar in general design to those recommended by the Clinton Bogert report. The effluent quality standards listed in the Bogert report would be adhered to as minimum requirements before the effluent was discharged into Berry's Creek and the existing waste-holding lagoon would be abandoned after completion and operation of the waste treatment facilities. This agreement was memorialized in a letter from the bureau to the company dated August 6, 1964.

By letter dated November 2, 1964 Wood Ridge reported to the Department of Health about its progress on the waste treatment facility. Wood Ridge promised that construction of a tile sewer and collecting sump for separation of process wastes would be completed by the end of November, after which further laboratory work would be done on the effluent and final plans for the treatment plant could be completed by March 31, 1965. The department responded by seeking greater haste on the company's part and indicating the hope that an adequate design and construction of a treatment project would be completed within the next few months so that "the source of pollution to Berry's Creek may be finally abated." By January 25, 1965

the Department of Health had apparently not received any information about the laboratory studies which were to accompany final installation of the sewers and collecting sump and sought additional information about the progress of the project. Apparently the sewer and collecting sump were completed on January 15, 1965. Wood Ridge planned to have the laboratory studies complete by March, with the planned treatment facilities "on stream by July 1965." In June 1965, however, the health department had received no reports on the laboratory studies or the design of the waste treatment facilities. Even by March 31, 1966 no treatment plant had been designed, let alone completed, at the site.

By late 1969 or early 1970 the federal Environmental Protection Agency became involved in the company's waste problems. John Ciancia, Chief of the Industrial Waste Section of the Federal Water Quality Administration, visited the site and determined that it was discharging process waste containing mercury. On October 23, 1970 the company approved a capital expenditure for improved effluent treatment—a problem characterized by a company document as "currently at an emergency level." That document asserted that

> We are discharging mercury at a rate which we cannot measure precisely, but which has been estimated by the F.W.Q.A. [Federal Water Quality Administration] at 4.2 lbs./day (55 GPM total discharge, averaged over 24 hours, 7 PPM mercury content). The preliminary standard which the F.W.Q.A. appears to be accepting from other mercury users is a maximum of 0.5 lbs./day, which we definitely exceed. . . . Ventron has already suffered adverse publicity because of alleged mercury discharges, and we will certainly receive more if we do not institute controls approved by the F.W.Q.A. While the current furor over mercury pollution undoubtedly contains much exaggeration and misinformation, it is unquestionably a toxic

> substance, and as such we are under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes.

From subsequent correspondence between the federal agency and Ventron (by then, 1971, owner of the processing plant), we deduce that the parties were attempting to work out the details of a new treatment process to reduce the amount of mercury admittedly being deposited into Berry's Creek. Ventron never succeeded in preventing mercury contaminated effluent from reaching Berry's Creek. As noted, the processing plant tract was sold to the Wolfs in 1974 and their development of the property caused additional pollution problems which resulted in the suit filed by the DEP.

In March 1976 the DEP filed the complaint against Ventron, Wood Ridge, Velsicol, Berk and the Wolfs charging violation of the New Jersey Water Quality Improvement Act of 1971, *N.J.S.A.* 58:10-23.1, to -23.10; L. 1971, *c.* 173, and with creation and maintenance of a nuisance. As noted, after the 55-day trial, Judge Lester held Berk and Woodridge directly liable for the cleanup and removal of the mercury; held Velsicol and Ventron severally liable for half of the costs; held that the Wolfs were not liable; and, although the Spill Concentration and Control Act (*N.J.S.A.* 58:10-23.1 to 23.11c, *L.* 1976, *c.* 141) did not apply retroactively, held that monies from the spill compensation fund should be made available for the cleanup. The Wolfs obtained judgment in their favor on their crossclaim against Ventron for fraudulent nondisclosure of mercury pollution in the sale of part of the tract, which judgment included costs and counsel fees incurred by the Wolfs in their defense of the DEP action. We essentially affirmed the judgment but modified in a number of respects, including the imposition of joint and several liability on Ventron and Velsicol for all costs incurred in the cleanup and removal of mercury pollution in Berry's Creek. We precluded pay-

ments from the spill compensation fund if other sources were available to pay for the cleanup and approved future monitoring of Berry's Creek at the expense of Velsicol and Ventron. *Id.* at 483, 468 A.2d 150. The Supreme Court affirmed the judgment of this court, modifying it only as to the counsel fee award to the Wolfs. *Id.* at 505, 468 A.2d 150.

In July 1985 Morton, the successor to Ventron, filed this complaint seeking a declaratory judgment that each of the insurance company defendants was obligated under their respective policies to provide indemnification and a complete defense on the DEP's suit. Judge Huot found that none of the defendant insurance companies had an obligation to indemnify Morton because Morton's predecessors' conduct in polluting the property did not come within the scope of coverage of the policies with respect to accidents or occurrences. He found the dumping of the mercury-laden effluent on the property neither an unexpected or unintentional misfortune (an accident) nor something unintended or unanticipated by the insured. Judge Huot found "ample demonstrative evidence" to establish that Wood Ridge, and therefore Morton, knew that the property was being polluted as far back as 1956. Thus, according to Judge Huot, "[t]he only available conclusion is that with that knowledge, Wood Ridge realized, foresaw and anticipated, indeed, it knew that it was causing injury to the property and to Berry's Creek." The judge rejected plaintiff's claim that its predecessors did not intend to pollute pointing to its knowledge of the consequences of the acts of dumping hazardous substances onto the property. He specifically found that the pollution was "by design" and the dumping of mercury was intentional. He confirmed the previous conclusion of our Supreme Court that all defendants in the Ventron case knew of the dangers of mercury. Judge Huot declined to accept Judge Lester's finding that Morton's predecessors did not intend to pollute Berry's Creek, concluding that this portion of

Judge Lester's opinion was *dicta* and not binding upon him.

General Accident was held liable for the costs of defending the first count in the complaint only, which count alleged that mercury and other hazardous substances leaked, dripped, spilled and discharged into Berry's Creek. Judge Huot so concluded because there was no allegation in this count that the conduct was deliberate or intentional. He thought that this count thus gave rise to a duty on the part of General Accident to defend.

Judge Huot also decided several other issues raised on the motions for summary judgment even though he acknowledged it unnecessary to rule on them given his ultimate resolution of these motions. He rejected the insurance company's claim that cleanup costs do not constitute property damage but are equitable matters which fall outside of an insurance policy. Relying upon the Law Division's unpublished decision in *Broadwell Realty Services v. Fidelity Casualty Co.*, 218 *N.J. Super.* 516, 528 A.2d 76 (App. Div. 1987), then pending in this court, he concluded that cleanup costs which include adjacent lands and waters constituted property damage within the meaning of general liability policies.

Without squarely deciding the issue, the judge also concluded that, since no occurrence or accident took place within the meaning of the insurance policies, given plaintiff's intent to pollute, the pollution exclusions would apply. Furthermore, because there was no occurrence, the fact that the damage to Berry's Creek continued through various policy periods did not trigger serial coverage under these policies. The judge also rejected the carriers' arguments for noncoverage based upon their claims of late notice. He found that no carrier had demonstrated prejudice by its receipt of late notice of the claim.

Subsequently, on March 20, 1989, Judge Lesemann issued a written decision on General Accident's liability for

the cost of defense on the first count of the complaint. Although Judge Lesemann questioned the propriety of determining that General Accident had a duty to defend to any extent when it had no duty to indemnify, he refused to entertain reargument of that question which had been decided by Judge Huot. Judge Lesemann ruled that General Accident's duty to provide a defense to Morton in the DEP action did not extend beyond November 15, 1979, the date on which Judge Lester entered judgment adverse to the insured. He concluded that at this point the facts had been fixed and the claim had been confined to a recovery which the policy did not cover. He also found that Morton bore the burden of allocating the costs between the DEP claim and those incurred defending the Wolf crossclaim. The final sum of $100,429.07 was General Accident's obligation to Morton in allocated defense costs, plus $ 40,000 in attorney's fees in the pursuing present action. *See R.* 4:42-9(a)(6).

I

Morton contends that the judge erred in granting summary judgment to the carriers because there were "genuine issues of fact in dispute." Both sides had moved for summary judgment. Morton's argument focuses only on *one* allegedly disputed factual issue: Whether plaintiff's predecessors intended to pollute Berry's Creek. Pointing to language in Judge Huot's opinion, plaintiff maintains that the judge was acting as a "factfinder," in violation of the standard governing determination of motions for summary judgment. As evidence that a genuine issue of material fact existed concerning plaintiff's intent to pollute, plaintiff points to Judge Lester's conclusion during the liability trial that plaintiff's predecessor, Wood Ridge Chemical, allegedly did not intend to pollute the creek. Plaintiff argues that the record provides "substantial evidence" of a reasonable dispute about Wood Ridge's intent to pollute the environment. General Accident asserts that

the undisputed facts show plaintiff's predecessors knew they were polluting Berry's Creek and plaintiff's self-serving affidavit claiming no intention to pollute could not create a factual issue where one did not otherwise exist.

Cases are not routinely resolved by way of summary judgment. Summary judgment is a stringent remedy "granted with extreme caution. The moving papers and pleadings are to be considered most favorably to the party opposing the motion. All doubts are to be resolved against the movant." *Ruvolo v. Am. Casualty Co.*, 39 *N.J.* 490, 499, 189 A.2d 204 (1963). The opposing party, however, is obligated to provide affidavits or other matters in opposition which are material, of a substantial nature, and more than a mere scintilla in order to show the existence of an issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75, 110 A.2d 24 (1954).

Courts heed the admonition that "issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining the motion for summary judgment." *Ibid.* Equally pertinent is the principle that "in any case where the subjective elements of willfulness, intent or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain." *Id.* at 76, 110 A.2d 24; *Exxon Corp v. Wagner*, 154 *N.J. Super.* 538, 541, 382 A.2d 45 (App. Div. 1977).

Plaintiff charges Judge Huot with improperly acting as a factfinder on this summary judgment motion with respect to the issue of intent, pointing to a statement in the judge's opinion where he said that "the factfinder must infer a state of mind from the words and conduct of the party . . . ." We discern that at this point in his opinion Judge Huot was not referring to himself as a factfinder. Instead, he was noting that since the insurance provisions

under scrutiny required analysis of the insured's intentions and expectations, the case involved a "subjective state of mind." The judge concluded that in determining state of mind, particularly where the insured is a corporation and the focus is on a responsible corporate officer, self-serving, noncontemporaneous statements of denial of intent are not necessarily controlling or even persuasive on the motion. The judge then correctly noted that "in all matters wherein a subjective state of mind is an element of responsibility, the factfinder must infer a state of mind from the words and conduct of the party at the time of the event and such other demonstrative evidence as is available." Judge Huot ultimately found with respect to intent "that the deliberate dumping of toxic mercury onto the land, while possessed of that knowledge [of the dangers of mercury and pollution of the creek], constitutes an intent to injure that property as a matter of law." Plaintiff disagrees with this legal conclusion and asserts that this is improper fact-finding by a judge on a motion for summary judgment.

We first consider another aspect of plaintiff's contention under this point, that is, the binding effect of Judge Lester's prior finding after trial in the DEP case of no intent to pollute. Without using the term, plaintiff suggests that Judge Huot was collaterally estopped from finding that plaintiff intended to injure either the property or the environment because Judge Lester specifically found that plaintiff acted with no such intent. Plaintiff also points to this finding by Judge Lester as strongly suggestive that a genuine issue of material fact existed on the issue of intent and this is further reason that summary judgment should not have been granted to defendants.

Collateral estoppel, or issue preclusion, is part of the wider law of *res* judicata which prohibits relitigation of any issue actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. *State v. Gonzales*, 75 *N.J.* 181, 186, 380 A.2d 1128 (1977); *Mazzilli v. Accident & Casualty Ins. Co.*,

26 *N.J.* 307, 313-314, 139 A.2d 741 (1958). An equitable doctrine, it will be applied only when fair. *Kozlowski v. Smith,* 193 *N.J. Super.* 672, 675, 475 A.2d 663 (App. Div. 1984). One such equitable situation involves insurance companies where there is a question about the insurer's duty to defend an action in the face of a coverage issue. Our Supreme Court has held that an insurer will not be prohibited from challenging a coverage claim in a proceeding upon the policy where it has not defended the insured in the liability litigation between the insured and a third party. *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.,* 98 *N.J.* 18, 24-25, 483 A.2d 402 (1984); *Burd v. Sussex Mutual Ins. Co.,* 56 *N.J.* 383, 394, 267 A.2d 7 (1970); *See Buinno, Current N.J. Rules of Evidence,* Comment to Evid. R. 63(21) at 670 (1990) ("Note that the judgment offered under Rule 63(21) is not admissible as proof of the indemnity obligation."). The liability trial between plaintiff's predecessor and the DEP did not touch upon the issue of insurance coverage. The question of plaintiff's intent in creating and dumping mercury-laden effluent to course over its property and end up in Berry's Creek was not considered in the context of insurance policy provisions, but only in terms of statutory and common-law liability for such acts. Not having the opportunity to present its views in court on plaintiff's intent relative to the policies issued by them, defendant insurers certainly are not now precluded from litigating the issue by Judge Lester's findings on intent.

Clearly from the context of Judge Lester's opinion, his observations about plaintiff's predecessors' intent were made in a far different context than on the summary judgment motion in this coverage case. Judge Lester, having found plaintiff strictly liable on statutory grounds, turned to consider an alternative basis for liability asserted by the State, namely, nuisance theory liability. He began by finding that the State had established plaintiff's liability under a statutory nuisance theory. He then moved onto

the State's claim that plaintiff was liable under a common law nuisance theory, an assertion which Judge Lester rejected on the basis that the State failed to prove intentional conduct on the part of plaintiff. Judge Lester examined the term "intent" as it "is used in the law of torts." He found that

> [w]hat is meant is that the actor acts for the purpose of causing the invasion of another's interest or knows that such an invasion is resulting or is substantially likely to result from those acts. Surely Berk and WRCC intended to and volitionally did manufacture mercury compounds and dumped waste on the Velsicol property. However, the court cannot find that the acts were done with the intent to pollute the waters of the State with the knowledge that such an invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

The judge was not considering whether plaintiff's conduct was intentional within the meaning of the insurance policy provisions which were before Judge Huot. His findings are not conclusive against the insurers under the circumstances.

Perhaps the more debatable aspect on this appeal is whether Judge Huot overreached the bounds of a summary judgment motion judge when he resolved the issue of plaintiff's intent to injure against it as a matter of law on the evidence before him. Most recently this court has cautioned that

> Summary judgment should not be granted where the adjudication of such a motion would constitute what is in effect a trial by affidavits on issues of fact . . . Moreover, the court should be particularly hesitant in granting summary judgment where questions dealing with subjective elements such as intent, motivation and duress are involved. [Citations omitted]

> In short, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy.

Shanley & Fisher, P.C. v. Sisselman, 215 *N.J. Super.* 200, 211, 521 A.2d 872 (App. Div. 1987). On the other hand, since both sides moved for summary judgment, one may fairly assume that the evidence was all there and the matter was ripe for adjudication. "It is equally well settled, however, that where no factual disputes are present, *or* the *undisputed facts* demonstrate that one party is entitled to judgment as a matter of law, summary judgment in favor of that party is entirely appropriate." *Collins v. Am. Optometric Ass'n.,* 693 *F.*2d 639, 636 (7th Cir. 1982). We appreciate that cross-motions for summary judgment do not, of necessity, obviate a plenary trial on disputed issues of fact. *O'Keefe v. Snyder,* 83 *N.J.* 478, 487, 416 A.2d 862 (1980); *Asbury Park Press v. City of Asbury Park,* 23 *N.J.* 50, 56, 127 A.2d 401 (1956). But when there is no *material* issue of fact and one party is entitled to a judgment as a matter of law, summary judgment is mandated. Indeed, this action bears a close resemblance to two federal district court cases involving coverage claims arising from long-term pollution activities by the alleged insureds which had culminated in trials and adverse liability verdicts in state courts on the pollution damage claims. In both cases the federal courts sensibly reviewed the records of the underlying state proceedings against the insured, analyzed the coverage issues, and ruled as matter of law on summary judgment that there was no coverage for the long-term pollution-causing activity. *See Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co.,* 716 *F. Supp.* 1541 (D.Md. 1989); *American Motorists Ins. Co. v. General Host Corp.,* 667 *F. Supp.* 1423 (D. Kan. 1987).

Judge Huot concluded that what might ordinarily be an issue of fact—the question of intent—based on the undisputed record before him, was a question of law and that

plaintiff intended to injure the land and the creek as a matter of law. Thus, the critical question is whether intent, in this context, can be determined as a matter of law. There is recent precedent in this court that the nature of an act, specifically child molestation, may be deemed intentionally injurious as a matter of law. In *Atlantic Employers v. Tots & Toddlers*, 239 *N.J. Super.* 276, 277, 571 A.2d 300 (App. Div. 1990), *certif. denied*, 122 *N.J.* 147, 584 A.2d 218 (1990), we affirmed the entry of summary judgment in favor of the plaintiff insurance company where its insured, the co-owner of a day care center, was charged with sexually abusing certain children. The wife, the other owner of the center, and the corporation (the center) were also sued for negligence in supervision. The policy issued by plaintiff to the corporation and the owners provided coverage for an occurrence as long as the injury or damage which resulted therefrom was "neither expected nor intended by the insured." Specifically excluded was coverage for personal injuries which resulted from a violation of a penal statute. *Id.* at 239 N.J.Super. at 281, 571 A.2d 300. Appellants-intervenors were parents of the allegedly abused children who had been denied their right to intervene; they appealed as well from the summary judgment entered in favor of the insurance company on the grounds that there was no coverage for intentional acts. They argued that even though the alleged molester had the requisite level of intent to be found criminally liable for sexual molestation, that did not mean that he intended to inflict the damages or injuries incurred by the children as a result of his actions. They claimed that intent was open to factual dispute and thus summary judgment was inappropriate.

Judge Scalera, writing for this court, held that while there were "no New Jersey cases directly on point," he agreed with the position of Minnesota and New Hampshire that certain acts, such as here involving a sexual assault upon a child, were "inherently injurious and could not be treated as an accidental cause of injury under the insur-

ance policy." *Id.* at 283, 571 A.2d 300. Characterizing the test as an objective one, he concluded that

> As a matter of public policy and logic we conclude that the better rule warrants application of the objective approach. A subjective test suggests that it is possible to molest a child and not cause some kind of injury, an unacceptable conclusion. Certainly one would and should expect some physical or psychological injury or both to result from such acts.

Ibid. The summary judgment with respect to the wife and the corporation was reversed, since the complaint alleged negligence in their supervision and operation of the day care center, conduct for which coverage may be afforded under the policy. *Id.* at 284-285, 571 A.2d 300. No other reported decision in this State has considered precisely whether intent can be inferred as matter of law from the factual complex in an insurance coverage case. Not so in other jurisdictions. Many jurisdictions subscribe to the principle that, for purposes of determining coverage under liability insurance policies, "intent to injure may be shown by proof of actual intent to injure, or it may be inferred from the nature and character of the act." *Western World Ins. Co. v. Hartford Mut. Ins.*, 600 *F. Supp.* 313, 319 (D.Md. 1984). Accord, *J.C. Penney Cas. Ins. Co. v. M.K.*, 52 *Cal.3d* 1009, 278 Cal.Rptr. 64, 804 *P.*2d 689 (1991) (coverage under liability policy for sexual molestation of child unavailable whether or not insured subjectively intended harm); *Landis v. Allstate Ins. Co.*, 546 *So.*2d 1051, 1053 (Fla. 1989); *Heshelman v. Nationwide Mut. Fire Ins. Co.*, 412 *N.E.2d* 301, 302 (Ind. Ct. App. 1980); *Truck Ins. Exchange v. Pickering*, 642 *S.W.*2d 113, 116 (Mo. Ct. App. 1982); *State Farm Fire & Casualty Co. v. Victor*, 232 *Neb.* 942, 442 *N.W.*2d 880, 883 (1989). See also, *Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or*

*Expected by Insured, 31 A.L.R.*4th 957, 988 (1984), § 5[b] "Intent actual or inferred by nature of act."

The precise controlling theory for ascertaining intent of the insured may fairly be called obscure, if not uncertain, since *Ambassador Ins. Co. v. Montes,* 147 *N.J.* Super. 286, 371 A.2d 292 (App. Div. 1977), *aff'd on other grounds,* 76 *N.J.* 477, 388 A.2d 603 (1978) (Pashman, J. and Handler, J., concurring; Clifford, J., dissenting) (fire victim may recover from arsonist's liability carrier because arson, not injury or death, intended). That case does make clear that where there is intentional wrongdoing, the insured may not benefit from the carrier's obligation to pay an innocent wrongdoer; indeed, the insured must reimburse the carrier by way of subrogation. "This application of subrogation is consonant with its traditional usage as an equitable mechanism to force the ultimate satisfaction of an obligation by the person who in good conscience should pay." 76 *N.J.* at 484, 388 A.2d 603. Thus, *Ambassador Ins. Co. v. Montes* offers no solace to an intentional polluter who wants to recover remediation, cleanup and defense costs from its liability carrier.

Our cases have demonstrated that construction of the term "intent" in the context of liability insurance policies may depend on the language of the particular policy provision. In *Ambassador Ins. Co. v. Montes, supra,* the Supreme Court had no policy provision before it dealing with intent but, in affirming the Appellate Division result, implicitly adopted an objective standard by which to measure intent. This standard does not require that the insured intend the consequences that actually flow from his actions; it is sufficient if he knows that the injuries are certain or substantially certain to result from his actions to establish that he intended the injury. 147 *N.J. Super.* at 291-292, 371 A.2d 292. As Justice Pashman pointed out in his concurring opinion in *Ambassador, supra,* this concept of intent may conflict with the more subjective standard sometimes used for evaluating intent in liability

insurance policy cases. That rule was set out in *Lyons v. Hartford Ins. Group,* 125 *N.J. Super.* 239, 310 A.2d 485 (App. Div. 1973), *certif. denied,* 64 *N.J.* 322, 315 A.2d 411 (1974). There the policy provision under scrutiny was an exclusion which prohibited recovery under the policy for those instances where there was bodily injury "which is either expected or intended from the standpoint of the insured." *Id.* at 244, 310 A.2d 485. In determining whether a particular injury was either expected or intended from the viewpoint of the insured the panel in *Lyons* articulated the following principle:

> The general rule is that coverage exists under insuring and exclusion clauses identical or similar to the ones involved here for the unintended results of an intentional act, but not for damages assessed because of an injury which was intended to be inflicted. . . . . [T]here is coverage for unintended results.
>
> . . . .
>
> Thus, the distinction between intended and unintended results of intentional acts is well recognized. The trial court did not apply this principle. The oral opinion below can be construed as holding that if Lyons [the insured] intended to fire without any specific intent to cause death or bodily harm, coverage did not exist. . . . The short of it is, if Lyons intended to maim or kill Berger [the victim] he has no coverage. If his intent was, as he says, to fire a warning shot, but he unintentionally fired prematurely, coverage exists. [*Id.* at 245; 247, 310 A.2d 485.]

This court noted that whether the exclusionary clause was phrased as excluding injuries "either expected or intended from the standpoint of the insured," the result would be the same as if the exclusionary clause precluded coverage for injury "caused intentionally by or at the direction of the insured." Id. at 247, 310 A.2d 485.

The subjective and objective standards of intent were recently discussed and the principles applied by this court in *Allstate Ins. Co. v. Schmitt,* 238 *N.J. Super.* 619, 570 A.2d 488 (App. Div. 1990), *certif. denied,* 122 *N.J.* 395, 585 A.2d 394 (1990). There we made it quite clear that the construction of an exclusionary clause and the standard of intent required thereunder may depend upon the language of the particular policy provision. In that case we rejected the insured's and the victim's arguments favoring a subjective construction of intent and their reliance upon *Ambassador* and *Lyons.* In *Schmitt,* Allstate's insured and the corporate owner of a cocktail lounge were defendants in a suit charging the insured with assault. The insured had pled guilty to an indictment charging him with aggravated assault by recklessly causing bodily injury to another with a deadly weapon. *Id.* at 621-622, 570 A.2d 488. Allstate instituted a declaratory judgment action to resolve the coverage issue when the insured notified Allstate that Schmitt, the victim, was asserting a claim. The insured and Schmitt contended that the policy did not exclude claims for the unintended results of criminal conduct. The insurer relied upon a policy provision which asserted that it did "not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person which is in fact intended by an insured person." *Id.* at 623, 570 A.2d 488. Relying upon *Ambassador* and *Lyons,* Schmitt and the insured claimed that the policy exclusion was confined to instances where the insured intentionally injured his victim and subjectively desired to cause the type of harm actually inflicted. We disagreed.

Judge Baime, writing for the panel, pointed out that the policy provisions under scrutiny in *Ambassador* were clearly distinguishable from the policy provision found in Allstate's policy. In *Ambassador,* there was no exclusionary clause or policy limitation under consideration by the majority. The provision in *Lyons, supra,* excluded coverage

for bodily injury which was "either expected or intended from the standpoint of the insured." *Id.* 125 *N.J.Super.* at 265, 310 A.2d 485. In Allstate's exclusionary provision

> Conspicuously absent are the words "intended" and "from the standpoint of the insured," words that can reasonably be said to connote a subjective element hinging upon the actual desire to inflict injury harbored by the insured. In contrast, the Allstate exclusion is not altogether premised upon a subjective intent to injure another. Instead, the factual predicate to the exclusion is either the commission of a crime, whether or not intentional, or the doing of an intentional act. [*Id.* at 626, 310 A.2d 485.]

We explicitly rejected the assertion that use of the words "reasonably . . . expected" added a subjective element to the exclusion and required a conscious desire to inflict injury upon the victim. We saw those words as

> . . . designed to insure that the policy's protection would be accorded to idiosyncratic unforeseeable or wholly attenuated consequences of the insured's criminal or intentional act. As we read the policy language, the exclusion was not intended to apply to the remote or highly extraordinary or improbable consequences of the insured's criminal or intentional conduct. [*Id.*]

We pointed out that the exclusionary clauses in the provision were phrased in the disjunctive so that coverage was prohibited where bodily harm was in fact intended by the insured—clearly requiring subjective intent. To interpret the phrase "reasonably be expected" as also to require a subjective intent would render the clause redundant. *Id.* 125 *N.J.Super.* at 266-267, 310 A.2d 485.

In the present case, seven insurance companies issued various policies to plaintiff. Five of those companies' policies contained identical provisions; the remaining two have

different provisions which are identical to each other. General Accident, Liberty Mutual, American Home, Affiliated FM and First State all issued plaintiff liability policies providing coverage for an occurrence which they each defined as "an accident, including continuous or repeated exposure to conditions which result in bodily injury or property damage that is neither expected or intended from the standpoint of the insured." General Accident's policies issued in 1964 and 1965 defined occurrence slightly differently: as an "unexpected event or happening which results in property damage provided that the insured did not intend or anticipate the result." London Market Insurers and Continental Casualty issued policies to plaintiff providing coverage for an occurrence which was defined as an accident (London Market Insurers) or an event (Continental Casualty) which unexpectedly or unintentionally caused injury or property damages.

Thus, the provisions themselves are similar to, if not identical with, the provisions in those cases where our courts have determined that the character of the act can be the basis of an inference that the insured intended the injury. Accepting this principle adds a sensible dimension to the concept of intent for purposes of liability insurance policy construction. This principle makes the actor's testimony about subjective intent less than controlling but allows a judge to conclude, from the circumstances of the act, what the actor's real intent was, despite verbal protestations to the contrary. It restrains the court from "ignoring reality" and accepting "the testimony of the insured" that he "did not intend to injure plaintiff" despite the fact that a "reasonable analysis [of the circumstances] requires the conclusion that from the very nature of the act harm must have been intended." *State Farm Fire & Casualty Co. v. Victor, supra,* 232 *Neb.* 942, 442 *N.W.*2d at 883, quoting *Jones v. Norval,* 203 *Neb.* 549, 554-555, 279 *N.W.*2d 388, 391-392 (1979). In the case before us, as in the child sexual molestation case, *Atlantic Employers*

v. Tots & Toddlers, supra, 239 *N.J. Super.* 276, 571 A.2d 300, we conclude that the concepts of the insured's expectation, its intent and its conduct really become indistinguishable. The intentional character of the act is the basis for the inference that the insured either intended or was manifestly indifferent to the prospect of the injury.

The Second Circuit, in expressing its view of New York law, summarized the concept of "damages expected or intended by the insured" well. It said in *City of Johnstown, N.Y. v. Bankers Standard Ins.,* 877 *F.*2d 1146, 1150-1151 (2d Cir. 1989):

> In general, what makes injuries or damages expected or intended rather than accidental are the knowledge and intent of the insured. [Citation omitted]. It is not enough that an insured was warned that damages might ensue from its actions or that, once warned, an insured decided to take a calculated risk and proceed as before. [Citations omitted]. Recovery will be barred only if the insured intended the damages, [citation omitted], or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act [citations omitted]. In those instances, coverage is precluded because the damages are not "accidental."

In Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability,* 9 *Rutgers L. J.* 9 (1986), the authors have thoroughly traced the history of the standard form comprehensive general liability policy from the "caused by accident" clause, through coverage for "occurrence" in the 1966 industry-wide change, to the current pollution exclusion clause with the "sudden and accidental" exception. The authors summarized the history of judicial interpretation of these clauses this way: "Coverage will exist for

the unintended adverse results of intentional acts except where the court determines that the harm involved was so certainly foreseeable to the insured as to have been constructively intentional." *Id.* at 70. The ruling in the Law Division adverse to Morton's coverage claim is another example of the principle in application. Throwing toxic waste out into the meadowlands was no accident or "calculated risk."

We agree that this principle expressed by the *Rutgers L. J.* authors and the Second Circuit in *City of Johnstown* is sound and operates to explain and justify the decision under review. In contemporary parlance, what did plaintiff's predecessors know about the toxicity and mercury content of its effluent and when did they know it? As early as 1956 plaintiff knew that the effluent which ran into Berry's Creek was unacceptable to the New Jersey Department of Health, which had inspected the plant and found that it had unacceptably high suspended solids content and that the settling tank was not large enough. The Department of Health continued to inspect the facility through 1959, consistently recommending that a waste water treatment system be devised "in order to eliminate pollution of Berry's Creek." In 1959 plaintiff hired Edward R. Grich, Inc. to study the waste problem and to recommend treatment systems. Another report was commissioned and completed in February 1960 but apparently none of its suggestions were adopted. A February 1960 report issued by the State Department of Health found no waste treatment system but found mercury compounds peculiarly absent from the effluent it tested at that time. Plaintiff was directed to institute a waste treatment plan because the industrial waste effluent was unacceptable for discharge into Berry's Creek. Apparently nothing more happened between 1960 and 1965 except that plaintiff promised, in May 1965, to begin design and construction of a treatment plant within one month. This promise was not kept either.

By February 14, 1968 corporate officials acknowledged that a complete treatment procedure had not yet been developed and, at least in part, due to the effluent problems, the plant was sold to Ventron. The sale price no doubt recognized the environmental problems. An intramural Velsicol memorandum of February 14, 1968 stated:

> I met with Mr. Harry Hughes and Mr. Ben Burke. Mr. Douglas Clark was detained for personal reasons and joined the meeting at 3:30 PM. However I had the opportunity to explain to all three the background history of the problem. Briefly, my explanation was as follows: In 1964-65 Wood Ridge took a first step toward the solving of the effluent problem in construction of a new chemical sewer system throughout the plant thereby combining all chemical wastes at the south east property corner. This system eliminated dilution of effluent by plant cooling water and surface drainage thereby allowing studies of effluent from this source.
>
> From that date, various investigations by both Edward R. Grich and our own staff have been made. To date a complete treatment procedure has not been developed. Procedures have been established for Ph control and solids removal but none for reduction of BOD and COD.
>
> The parent company, Velsicol Chemical Corp. became disenchanted with the Wood Ridge operation (for various reasons) and approximately 2 years ago decided to sell. The local W-R Management was unaware of this decision for some time but the result was that little or no progress was made on effluent problems.
>
> On February 1, 1968, Wood Ridge Chemical was purchased by Ventron, Beverly, Mass. This parent company is aware of the problem and will aggressively support efforts to meet State and Federal require-

> ments. As a start, this problem has become my responsibility as Vice President and Plant Engineer of W.R.C.C.

Substantial environmental pollution over a long period was manifest in this record. The polluter knew that the substance being discharged into the environment was toxic and harmful. In this context, to condone intentional pollution over a long period of time as portending no expectation of harm is an "unacceptable conclusion." *Atlantic Employers v. Tots & Toddlers, supra,* 239 *N.J. Super.* at 283, 571 A.2d 300. We affirm the conclusion that, as a matter of law, on this factually undisputed record, plaintiff intended to cause harm to the environment in and around Berry's Creek.

Juxtaposed to the documentary evidence is an affidavit by Joseph Bernstein, general manager of Wood Ridge Chemical and Ventron from 1968 through 1979 in which he asserted "that at no time during our ownership did we intend or expect that our manufacturing processes, our effluent treatment process or our disposal system were then harming the environment, nor did we intend or expect that they would ever do so." He also asserted that in light of their efforts to implement more efficient chemical processes and effluent treatment measures it never occurred to the company that the product of their mercury plant was ever going to harm any life form or the environment. In its brief plaintiff also points to certain portions of Bernstein's deposition and trial testimony excerpted in the record indicating that it never expected or intended the discharges to harm the environment. Those portions of Bernstein's testimony developed nothing more than the fact that the company tried to minimize mercury loss in the product for profit and loss reasons, not necessarily to protect the environment.

We conclude that the evidence in this extensive record was sufficient to permit Judge Huot to conclude as a mat-

ter of law that plaintiff's predecessors intended to pollute Berry's Creek. Indeed, any contrary conclusion would require the judge to sit with blindfolds and defer the inevitable conclusion. Our Supreme Court concluded from the record in the pollution trial that "the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury." 94 *N.J.* at 481, 468 A.2d 150. "The concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world." *Id.* "The contamination at Berry's Creek results from mercury processing operations carried on at the site for almost fifty years." *Id.* at 482. And, "Ventron knew that the site was a man-made mercury mine." *Id.* at 485, 468 A.2d 150. The evidence supports Judge Huot's finding that plaintiff intended to harm the environment as a matter of law. He specifically found that the end result was "substantially certain to follow" and "not fortuitous." Judge Huot specifically noted in his opinion:

> The trial court in the underlying litigation either overlooked or was unaware of certain documents in arriving at its conclusion that Berk and Wood Ridge intended to dump hazardous substances but did not intend to pollute the waters of the State. The demonstrative evidence appended to the briefs submitted by plaintiff and defendants establishes otherwise.

The judge would have ignored reality to conclude that plaintiff's predecessors did not know that the mercury and its effluent was harmful to the land over which it coursed and the waters into which it fell.

II

In its next two points, which are related to the issue just discussed, Morton contends that Judge Huot erred in holding that the injury done to the environment by the mercury was not caused by accident within the meaning of General Accident's pre-1966 policies and that he also

erred in determining that no "occurrence" took place warranting coverage under any of the expanded-definition post-1965 policies issued by the other defendant insurance companies. The "occurrence based coverage" was designed to embrace "not only the usual accident, but also exposure to conditions which may continue for an unmeasured period of time." *See Broadwell Realty v. Fidelity & Cas.*, 218 *N.J. Super.* 516, 533, 528 A.2d 76 (App. Div. 1987).

As noted in I *post*, only General Accident's policy issued in 1964 specifically provided insurance for bodily injury or property damage "caused by accident" which occurred during the policy period and the policy did not define "accident." Indeed, the standard general comprehensive liability insurance policy in use throughout the industry at that time, before 1966, contained no such definition. *Broadwell Realty v. Fidelity & Cas., supra*, 218 *N.J. Super.* at 532, 528 A.2d 76. Without a definition, the courts were left with the task of defining the word "accident." The general definition which emerged stated that an accident was "an unexpected happening without intention or design." *Ibid.* "Accident" was defined broadly on the theory that words, undefined by an insurer, should be generally construed in favor of the insured to effect coverage where tenable. *McGroarty v. Great American Insurance Company*, 36 *N.Y.*2d 358, 368 *N.Y.S.*2d 485, 488, 329 *N.E.*2d 172, 175 (1975). Thus, broadly construed the word "accident" would encompass a volitional act by the insured "if the insured did not specifically intend to cause the resulting harm or [was] not substantially certain that such harm would occur." *Broadwell Realty v. Fidelity & Cas., supra*, 218 *N.J. Super.* at 532, 528 A.2d 76, quoting *Quincy Mut. Fire. Ins. Co. v. Abernathy*, 393 *Mass.* 81, 84, 469 *N.E.*2d 797, 799 (1984).

Judge Huot, however, used the more restrictive definition of accident set out in *Doria v. Ins. Co. of North Am.*, 210 *N.J. Super.* 67, 72, 509 A.2d 220 (App. Div. 1986). Under scrutiny in that case was a homeowner's

insurance policy which provided coverage for an occurrence which was defined as an accident which results in bodily injury; "accident" was not defined otherwise in the policy. Therefore, this court in *Doria* used a generally accepted definition to assert that "accident" meant "a sudden and fortuitous event, unexpected by the person to whom it happens." Judge Huot determined that since the policy before him phrased coverage in terms of an injury "caused by accident," the focus should be upon the manner in which the injury was caused, not on the result of an event. He concluded that the policy did not insure against an unexpected, unplanned and unanticipated result which proceeded from a deliberate act and thus found no coverage under General Accident's earlier policy. Plaintiff, Morton, now asserts that the judge too narrowly read the definition of accident and should have focused instead on the *Broadwell* articulation which concludes that an accident can indeed occur as a result of a volitional act if there was no specific intent to cause the resulting harm and the actor was not substantially certain that such harm would occur.

We conclude that Judge Huot did err to the extent that he did not recognize that volitional acts could result in damage which would qualify as an accident if the requisite conditions were met, that is, no specific intent to cause a resulting harm or no substantial certainty that such harm would occur. *See Quincy Mut. Fire Ins. Co. v. Abemathy, supra,* 393 *Mass.* at 84, 469 *N.E.*2d at 799, cited and quoted in *Broadwell Realty, supra,* 218 *N.J Super.* at 532, 528 A.2d 76. Judge Huot's reliance on the *Doria* definition of accident was misplaced since the *Doria* policy was clearly a post-1966 policy in which occurrence and accident have been defined synonymously and where the term "occurrence" has been interpreted as focusing on the underlying circumstances of the event which gave rise to the injuries rather than the injury itself. *Doria, supra,* 210 *N.J. Super.* at 72, 509 A.2d 220. In the present case, General Accident's policy is a pre-1966 policy which left

the definition of "accidents" to the courts which more broadly construed the term.

This does not compel a conclusion by us that this error requires reversal of the grant of summary judgment to defendants in this case. Looking at the broader form of the definition of "accident," plaintiff could be successful only if it could be said that it was not substantially certain that harm to the environment would occur if pollutant-laden effluent were dumped into the environment, allowed to traverse across the land, and eventually seep into Berry's Creek. As discussed in I *supra*, the evidence was overwhelming that plaintiff's predecessors must have been substantially certain that such harm would occur given its knowledge of the dangerous propensities of its effluent as early as 1956. The company was warned repeatedly by the Department of Health in those early years that its effluent had to be treated because unacceptable levels of pollutants were entering Berry's Creek. Thus, plaintiff must have been substantially certain that if it did not take steps to abate the pollution, harm surely would occur to Berry's Creek. Consequently, plaintiff's actions did not come within the broader definition of "accident" set out in *Broadwell Realty, supra*, 218 *N.J. Super.* at 532, 528 A.2d 76 ("an unexpected happening without intention or design").

Plaintiff's reliance upon *City of Johnstown, N.Y. v. Banker's Standard Ins., supra*, 877 F.2d 1146 is misplaced. Plaintiff interprets that case as standing for the proposition that where an insured takes a calculated risk in the face of warnings of potential injuries, insurance coverage will not be denied. Nevertheless, there was much more to *City of Johnstown*. Coverage was found there because the proofs failed to establish that the City should have expected that its landfill would pollute surrounding ground waters. Not so in the present case. Proof of plaintiff's awareness of its actions and the inevitable potential consequences thereof are abundant. This was no "calculated risk" by Morton's predecessors. The knowledge of envi-

ronmental harm was sure and certain. We must remember, in comparison, that in *Broadwell Realty, supra,* 218 *N.J. Super.* at 519, 528 A.2d 76, the pollution was caused by an "unforeseen and unexpected discharge of contaminants from fissures in underground storage tanks on the insured's property and the migration of such pollutants on the lands of third persons."

Other recent examples of construction of general liability policies in cases involving alleged "sudden and accidental" events where insureds sought coverage under the pollution exclusion exception in the current version of the CGL policy include: *The Upjohn Company v. New Hampshire Ins. Co.,* 438 *Mich.* 197, 476 *N.W.*2d 392 (1991) (by 4-3 vote Court decided known leak from storage tank not sudden and accidental); *A. Johnson & Co. v. Aetna,* 741 *F. Supp.* 298 (D.C. Mass. 1990), *aff'd,* 933 *F.*2d 66 (1st Cir. 1991) (Maine law—leaching and seeping through land and ground water not "sudden and accidental"); *Weber v. IMT Ins. Co.,* 462 *N.W.*2d 283 (Iowa 1990) (Iowa law—hog manure spilled and tracked on road over several years not "sudden and accidental"); *FL Aerospace v. Aetna,* 897 *F.*2d 214 (6th Cir. 1990) (Michigan law—mere delivery of liquid waste not "sudden and accidental" event sufficient to trigger coverage); *Cf. James Graham Braun Foundation, Inc. v. St. Paul Fire and Marine,* 814 *S.W.*2d 273 (Ky. 1991) (case not appropriate for summary judgment on issue of insured's intent). These interpretations of the current version of pollution exclusion and its exception by the courts are simply a "reaffirmation that coverage will not be provided for expected and hence avoidable results." *Broadwell Realty, supra,* 218 *N.J.* at 535, 528 A.2d 76.[1]

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[1] We add this note as to the "pollution exclusion issue." London Market, American Home and the Amicus, as well as Liberty Mutual and Affiliated FM who join in those briefs on this issue, contend that the pollution exclusion clauses found in the policies bars coverage as a matter of law and provides an alternative basis for upholding the

III

Plaintiff also contends that General Accident, Liberty

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grant of summary judgment to them.

Judge Huot very briefly considered this argument noting first that five different forms of pollution exclusion clauses were found among the policies and that they each required interpretation of the words "sudden" or "accidental" in determining their applicability. Relying upon this court's decision in *Broadwell Realty v. Fidelity & Cas.* 218 528 A.2d 76, *N.J. Super.* 516 (App. Div. 1987), he concluded that the "sudden and accidental" exception to the pollution exclusion was simply a restatement of the definition of occurrence. Since he found that no occurrence took place within the meaning of the policies before him, the applicability of the pollution exclusion clause became moot.

Only the policies issued by General Accident and Continental Casualty had no pollution exclusion. Judge Huot's observation was accurate when he indicated that there were various forms of the pollution exclusion in these policies. Affiliated FM, American Home, and Liberty Mutual pollution exclusions are identical. They refuse coverage to bodily injury or property damage

> arising out of the discharge, disbursal, release or escape of smoke, vapors, soot, fumes, acids, alkali, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if any such discharge, disbursal, release or escape is sudden and accidental.

INA's pollution exclusion refuses coverage to bodily injury, personal injury or property damage

> arising out of pollution or contamination
>
> (1) caused by oil, or
>
> (2) caused by the discharge or escape of any other pollutants or contaminants, unless such discharge or escape results from a sudden happening during a policy period, neither expected or intended from the standpoint of the insured.

London Market policies contain two different versions of the exclusion, one of which barred coverage for property damage caused by seepage, pollution or contamination unless" it was caused by an accident during the policy period or, after the seepage, pollution or contamination, an accident occurs proximately causing property damage during the policy period. Another provision excludes coverage for personal injury or prop-

Mutual and Affiliated FM are bound by Judge Lester's findings, particularly the finding that plaintiff had no intent to pollute, because they wrongfully refused to defend

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erty damage "resulting from any gradual cause such as subsidence, seepage, pollution or contamination."

INA's pollution exclusion is the most differently worded because it denies coverage for property damage "resulting from the intentional or willful disposal of any waste products, fluids or materials."

Despite the language variance, these exclusions are united by a common thread: they all require that the property damage be caused by pollution which is either sudden, accidental, or unintentional in order for there to be coverage. American Home urges that we reconsider this entire area of the law interpreting pollution exclusions and essentially reject *Broadwell Realty's, supra,* analysis identifying such exclusions with a definition of occurrence. London Market does not take issue with Broadwell but argues simply that the judge's analysis was correct and should be upheld. The Amicus launches into an extended analysis of pollution exclusions, canvasing the various jurisdictions in support of its claim that *Broadwell's* analysis is incorrect. The Amicus concludes that the words "sudden" and "accidental" have independent meaning and should not be interpreted as analogous to "unexpected," and should not be tied into the definition of occurrence as our courts have interpreted that term. Our Supreme Court has yet to speak on pollution exclusions in general liability policies. We have analyzed this policy provision in *Broadwell Realty, supra,* and in *Summit Assoc. v. Liberty Mut. Fire Ins.,* 229 *N.J. Super.* 56, 550 A.2d 1235 (App. Div. 1988), where *Broadwell* was reaffirmed as an appropriate method of analysis. The pollution exclusion under scrutiny in *Broadwell Realty, supra,* is phrased in terms identical to that found in Affiliated FM, American Home and Liberty Mutual's policies. There we adopted the approach taken by "substantial authority supporting the thesis that the pollution exclusion was intended to be coextensive with the scope of the definition of occurrence." 218 *N.J. Super.* at 533, 528 A.2d 76. Quoting other writers on the subject, we noted that this limitation of coverage was intended to apply only to the intentional polluter and was inapplicable to entities which neither expected nor intended their conduct to result in bodily injury or property damage. *Id.* at 534, 528 A.2d 76. We pointed to decisional law in our own State which interpreted pollution exclusions, particularly the "sudden and accidental" exception, as simply a restatement of the definition of "occurrence." *Ibid.* We agreed with that analysis finding that the pollution exclusion focused upon the intention, expectation and foresight of the insured.

plaintiff in the underlying lawsuit. Plaintiff also asserts that Judge Huot erred in concluding that Affiliated FM and Liberty Mutual were not obligated to provide a defense to the Wolf crossclaim because some of the counts in the crossclaim were arguably within those carriers' obligation to indemnify plaintiff.

Plaintiff contends that an insurer's duty to defend is broader than its obligation to indemnify and thus, where allegations in a complaint are arguably within the coverage obligation, the insurer has a duty to provide a defense even though other allegations in the complaint are arguably outside the policy's coverage. Plaintiff maintains that Judge Huot should have found those three carriers liable for the defense of the *Ventron* litigation because at least some of the allegations in the complaint and crossclaim could potentially have come within the policy's coverage.

Plaintiff's statement of the law is a general rule concisely articulated by Judge Pressler in *Hartford Ins. Group*

Id. at 535, 528 A.2d 76. Turning to the "temporal versus nontemporal" interpretation of "sudden," we observed that its construction of the exclusionary language had several benefits:

> By defining the word "sudden" as meaning unexpected and unintended, we avoid the question whether the focus of the exclusion is upon the release of the contaminant or the resulting permeation and damage to the environment. This issue has generated substantial debate in those jurisdictions which have construed the word "sudden" in temporal terms. [Citations omitted] In other words, does the word "sudden" refer to the "time necessary for the ultimate loss to manifest itself fully," [citation omitted], or does it refer to the actual release, escape or discharge of the pollutant? If the word "sudden" is defined as "rapid" or "instantaneous," how is the exclusion to be applied to the abrupt escape of a pollutant from a fissure in a tank caused by a gradual corrosive process? Mere recitation of these issues discloses the investigative and evidentiary problems which would inexorably flow from adoption of the arguments advanced by Fidelity. [*Id.* at 535-536, 528 A.2d 76.]

The logic behind this aspect of *Broadwell Realty, supra*, is compelling, in our view.

v. Marson Constr. Corp., 186 *N.J. Super.* 253, 257, 452 A.2d 473 (App. Div. 1982), *cert. denied*, 93 *N.J.* 247, 460 A.2d 656 (1983):

> As a general proposition, it is clear that under the typical liability policy, the duty of an insurer to defend is broader than its obligation to indemnify. The insurer's obligation to defend is triggered by a complaint against the insured alleging a cause of action which might potentially come within the coverage of the policy, irrespective of whether it ultimately does come within the coverage and hence irrespective of whether the insurer is ultimately obliged to pay. This principle, of course, applies where there is a factual issue between the third-party claimant and the insured, the resolution of which may result in an adjudication that at least part of the claim against the insured is within the policy coverage.

Our Supreme Court has twice held that that principle does not apply universally, but

> when coverage, *i.e.*, the duty to pay, depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured[;] the duty to defend may depend upon the actual facts and not upon the allegations in the complaint. [*Burd v. Sussex Mut. Ins. Co.*, 56 *N.J.* 383, 388, 267 A.2d 7 (1970).]

The factual complex in Burd is analogous to the present case. There the victim, D'Agostino, sued Burd for damages he incurred after Burd shot him; Burd was criminally convicted of atrocious assault and battery. The two-count civil complaint charged that Burd both intentionally and negligently fired a loaded gun at D'Agostino. Burd's homeowner insurance carrier, Sussex Mutual, refused to defend the suit on the ground that the policy expressly excluded coverage for bodily injury or property damage caused intentionally by or at the direction of the insured. Burd

retained his own counsel and the civil suit resulted in a general verdict for D'Agostino. Burd then sued the carrier to recover the amount of the judgment and the costs incurred in defending the action. Cross-motions for summary judgment were resolved in Burd's favor but that result was reversed by the Supreme Court.

As in the present case, Burd and his carrier each claimed that the other was bound by the judgment in a prior proceeding. The carrier claimed Burd was bound by the finding of intentional conduct in the criminal proceeding; Burd claimed that the carrier, having refused to defend the civil action, could not challenge his present allegation and the jury's implicit finding that the injuries were negligently, rather than intentionally, inflicted. In rendering summary judgment for Burd, the Law Division judge held that the carrier was bound by the civil jury's finding of negligent conduct. The Supreme Court disagreed and explained:

> The sense of the covenant is to defend suits involving claims which the carrier would have to pay if the claimant prevailed in the action. The covenant to defend is thus identified with the covenant to pay. That is the basis of the rule that ordinarily a carrier who defends unsuccessfully may not later deny coverage, absent an express agreement with the insured reserving a right to deny coverage. . . .
>
> Here the obligation to pay a judgment obtained by the injured party depended upon whether the injuries were intentionally inflicted within the meaning of the exclusionary clause. There may be cases in which the interests of the carrier and the insured coincide so that the carrier can defend such an action with complete devotion to the insured's interest. But if the trial will leave the question of coverage unresolved so that the insured may later be called upon to pay, or if the case may be so defended by a carrier as to prejudice the insured thereafter upon the issue of cov-

> erage, the carrier should not be permitted to control the defense. That was the situation in the case at hand. Although both the insurer and the insured would want D'Agostino to fail, yet if D'Agostino should succeed, as it was likely he would, the insured would want the basis to be negligence whereas the carrier would profit if the basis was an intentional injury within the policy exclusion. If plaintiff pressed his claim of negligence, the coverage issue would remain open, for the carrier could hardly insist the injuries were intentionally inflicted. Willfulness is not a defense to a charge of negligence. And if plaintiff sought a judgment for intentional hurt, the carrier could not be expected to resist that basis of liability with the fervor or fidelity of an advocate selected by the insured.
>
> In such circumstances the carrier should not be estopped from disputing coverage because it refused to defend. On the contrary the carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay. *See Slatterwhite v. Stolz*, 79 *N.M.* 320, 442 *P.*2d 810 (Ct. App. 1968). [*Id.* at 388-390, 267 A.2d 7.]

The Court continued that, in instances where the carrier's position is so different from the insured's that the carrier cannot defend the action in good faith, there has to be a proceeding in which the carrier and the insured, represented by counsel of their own choosing, can resolve their differences. That action, as occurred in *Burd* as well as here, may follow the trial of the third-party's suit against

the insured. The Court also suggested that a declaratory judgment proceeding could be brought prior to the third-party litigation so that the third-party suit could be defended by the party ultimately liable. *Id.* at 391, 267 A.2d 7. In the situation where a carrier does not defend the third-party claim because the coverage issue will not be there resolved, "it will have to reimburse the insured for the cost of defense if the tort judgment is held to be within the covenant to pay" after the separate proceeding is brought upon the policy. *Id.* at 394, 267 A.2d 7.

The similarity between *Burd* and the case before us is at once apparent. The litigation between the DEP and plaintiff in the present case did not and could not resolve the issue of coverage under the policies involved. The four-count complaint alleged statutory violations emanating from the discharge of mercury and other hazardous substances onto the property and eventually into state waters (Counts I, II and IV) and also alleged a continuing public and private nuisance (Count III). The statutory violations did not require any finding of intent, only a finding of the prohibited discharge. Thus, intent was never in issue in three of the four counts. The fourth count charging public nuisance was based on a strict liability statute and the extension of the principle of strict liability under the common law. Again, intent was irrelevant. With respect to the private nuisance theory, it is clear that intent was relevant, but on that issue there would have been a clear conflict of interest between the insurer and plaintiff: plaintiff seeking a finding of unintentional conduct so as to escape the imposition of liability while the insurer, for purposes of coverage, would be interested in having the court find that the plaintiff-insured intended the consequences of its deliberate act. Thus, the very conflict which existed in *Burd* and caused the Court to conclude there was no absolute duty to defend from the outset also exists in the present case.

The principles articulated in *Burd* were affirmed by our Supreme Court in *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J.* 18, 483 A.2d 402 (1984). There, the underlying suit was brought against a pharmaceutical house on behalf of an infant who had been prescribed a drug which caused her physical injuries. Aetna covered the company on the date the drug was dispensed. Hartford assumed coverage which was in effect on the date that the personal injuries to the child first became manifest. Thus, the dates on which the respective insurance companies coverages were in place (i.e., the date the drug was dispensed and the date the injuries were observed) were critical to a determination of which company was ultimately liable to pay the judgment against the pharmaceutical house. Hartford had assumed the defense, paid the judgment, and incurred counsel fees and litigation costs for which it sought 50% of the amount on the ground that Aetna breached its duty to defend—a breach Hartford claimed imposed liability upon Aetna as a matter of law. Since the complaint simply alleged the month in which the events establishing the company's liability occurred, Hartford argued that the complaint on its face demonstrated that the allegation fell within the policy's coverage.

This court disagreed and the Supreme Court affirmed, adopting Judge Skillman's Law Division opinion. Judge Skillman relied primarily upon the holding in *Burd*. He concluded that, because of the conflict generated by the critical coverage issue, *i.e.*, the chronology of the drug dispensation and the manifestation of the injuries in relation to the date the respective policies were viable, Aetna was within its rights in refusing to take over the defense on behalf of its insured and was justified in litigating the issue later in a separate proceeding. Moreover, the critical facts required to resolve the coverage question were extraneous to the trial of the child's claim against the pharmaceutical company. Had the jury been directed to answer relevant questions in the underlying action, this would have

created a serious risk of complicating the trial, confusing the jury, and perhaps prejudicing the rights of the parties since the insurer would not have been represented by its own counsel at that action. *Id.* at 24-25, 483 A.2d 402. Judge Skillman noted that "the practical effect of *Burd* is that an insured must initially assume the costs of defense itself, subject to reimbursement by the insurer if it prevails on the coverage question." *Ibid.* This is precisely what occurred in the present case and is consistent with *Burd* and *Hartford Accident & Indem. Co., supra. See also CPS Chemical Co. v. Continental Ins. Co.*, 203 *N.J. Super.* 15, 495 A.2d 886 (App.Div. 1985); *Heldor Indus. v. Atlantic Mut. Ins.*, 229 *N.J. Super.* 390, 551 A.2d 1001 (App. Div. 1988).

Plaintiff here acknowledges the holding of *Burd* and *Hartford* and their progeny, but contends that they should be read "as consistent with the view that at least where the issue or issues decided in the underlying case can resolve the issue of coverage and no conflict of interest has been asserted or claimed by the carrier at the time the defense was requested, the failure of the carrier to provide the defense estops the carrier from challenging the results." Although plaintiff maintains that its case "presents the factual premise for the application of these principles," the underlying case (*DEP v. Ventron*) did not resolve the issue of coverage and, indeed, could not have resolved it since the meaning of "intent," as that term was used by the insurance policies, was not then before the court. Moreover, the complaint itself should have put plaintiff on notice that a conflict of interest would arise between plaintiff and its insurance carriers because two of the counts alleged intentional, knowing pollution on the part of plaintiff.

The cases relied upon by plaintiff are readily distinguishable. In *Dunne v. Firemen's Fund Am. Ins. Co.*, 69 *N.J.* 244, 353 A.2d 508 (1976), not only were the insurance policy provisions under scrutiny different from those in

the present case, the insurer there had agreed at the outset to defend the action pursuant to a reservation of rights agreement with its insured. The policy imposed a duty on the insurer to defend if any theory of liability fell within the policy's coverage. The plaintiff in the underlying action in *Dunne* had alleged negligence which came within the policy coverage. Thus, the sole issue before the court was how to obtain performance of the insurer's previously admitted duty to defend the insured, in view of the potential conflict which arose if liability were imposed on some basis other than negligence. *Dunne* was not concerned with the task of interpreting a "duty to defend" clause of a policy. Rather, it was concerned only with the manner in which a previously acknowledged duty of an insured to provide a defense would be implemented. *Dunne* did not affect the holding of *Burd* which concerned the duties of an insurer where the duty to defend turned upon the existence of coverage and coverage was in dispute.

IV

Plaintiff also contends that Judge Huot erred in denying its motion to compel discovery relating to the drafting history of what plaintiff calls "key policy terms" contained in the comprehensive general liability policies issued to it. Plaintiff sought underwriting information and statements which it alleged would show the behavior of the company with respect to these provisions and the interpretation the companies placed on the "polluter's exclusion" in order to ascertain the meaning of the policy provisions at issue. Apparently a number of these provisions were standard policy provisions drafted by the Insurance Service Office (ISO) which, the judge asserted, was information plaintiff had already received from another source. Furthermore there had been an indication that an individual from the ISO would be subpoenaed. As to those insurers who did not use the ISO policy form, the judge determined that he saw no relevance of this information to any of the issues

in the case and that obtaining that information, at least as to Liberty Mutual, would require an inordinate amount of time, "an onerous burden which outweighs whatever possible relevance there might be if any."

On appeal, plaintiff relies upon *Broadwell Realty, supra,* pointing to our reference to the drafting history of the pollution exclusion in our analysis and interpretation of that clause in that case. 218 *N.J. Super.* at 533-534, 528 A.2d 76. According to plaintiff, if it had had the opportunity to present evidence about the history of the policy terms under scrutiny in the present case, it might have been able to change Judge Huot's conclusion."

Our rules of discovery are liberally construed and accorded the broadest possible latitude. *Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J. Super.* 200, 216, 521 A.2d 872 (App. Div. 1987). This principle permits a court to compel a party to produce all relevant, unprivileged information which may lead to the discovery of other relevant evidence. To that end, wide discretion is given to the trial court to determine the scope of discovery. *Axelrod v. CBS Publications,* 185 *N.J. Super.* 359, 372, 448 A.2d 1023 (App. Div. 1982); *Howard Savings Inst. v. Francis,* 133 *N.J. Super.* 54, 59, 335 A.2d 80 (App. Div. 1975).

Given plaintiff's reliance upon *Broadwell Realty,* it appears that plaintiff wanted information which would explain why the defendant carriers chose the particular language for their policy terms concerning coverage for accidents and occurrences, as well as exclusionary provisions. *Broadwell,* however, traced the history of the occurrence definition and the pollution exclusion, not through company documents and communications such as those sought by plaintiff in the present case, but rather through treatises and commentaries in legal publications. These were the sources which provided the data upon which this court based its conclusions about the meaning of those provisions. Here, plaintiff is not seeking industry-wide in-

formation about standard policy provisions. Plaintiff wants specific communications concerning the individual company's underwriters and their decisions to use certain phraseology in the policy provisions presumably to obtain a clarification about the intent behind the words chosen.

V

We now turn to the cross-appeal. General Accident contends that Judge Huot erred in finding that it had a duty to defend plaintiff on any count or theory alleged in the *Ventron* complaint after he found that it had no obligation to indemnify plaintiff. Relying upon *Hartford v. Aetna, supra,* 98 *N.J.* 18, 483 A.2d 402; *Burd v. Sussex Mut., supra,* 56 *N.J.* 383, 267 A.2d 7, and *CPS Chemical Co., Inc. v. Continental Ins. Co., supra,* 203 *N.J. Super.* 15, 495 A.2d 886. General Accident argues that its duty to defend is coextensive with its duty to indemnify and it was error for Judge Huot to have concluded otherwise. We agree.

Interestingly enough, Judge Lesemann identified this problem with Judge Huot's opinion but ruled that, at that point in the proceedings, he would not redetermine the issue of General Accident's duty to defend. Judge Lesemann pointed to other cases such as *Ohio Casualty Ins. Co. v. Flanagin,* 44 *N.J.* 504, 512, 210 A.2d 221 (1965), and *West v. MacDonald,* 103 *N.J. Super.* 201, 212, 247 A.2d 20 (App. Div. 1967), aff'd o.b. 52 *N.J.* 536, 247 A.2d 129 (1968), which assert the proposition that the duty to defend is broader than the duty to pay—the nature of the damage claim, rather than the accident's actual details or the insurer's ultimate liability determines whether there is an obligation to defend. We see no inconsistency between that line of cases which follows the general principle that the duty to defend is broader than the duty to indemnify, and that line of cases, of which *Burd* and *Hartford v. Aetna,* are two, which hold that the duty to defend is coextensive with the duty to indemnify. The procedural posture of the individual case determines which principle

will be applied in determining whether the duty to defend exists.

The facts and legal analysis of both *Burd* and *Hartford v. Aetna* have been set out. We need not travel that ground again. We find it sufficient to say here that the concept of the coextensive nature of the duty to defend and the duty to indemnify is applicable to those cases where there has already been litigation on the underlying tort action and the details of the claim against the insured have been fully and conclusively set to rest. At that point it is unnecessary to turn to the complaint to determine whether the duty to defend exists since the actual factual record concerning the underlying tort action has been established.

In cases like *Ohio Casualty Ins. Co., supra,* and, more recently, *Hartford Ins. Group v. Marson Constr. Corp., supra,* 186 *N.J. Super.* 253, 452 A.2d 473, no such factual determination had been made. In *Hartford v. Marson,* the underlying tort ligation was settled before the insurer had its day in court on its declaratory judgment action. Thus, when determining the issue of the insurer's duty to defend, all the court had before it was the complaint and the terms of the insurance policy. *Id.* at 256-257, 452 A.2d 473. Similarly, in *Ohio Casualty Ins. Co.,* the insurer's declaratory judgment action was heard before the underlying tort action and, consequently, the court had only the allegations of the complaint against which to measure the insurer's duty to defend. Interestingly enough, the Supreme Court in that case cautioned trial courts against entertaining declaratory judgment actions before the damage suit is resolved. The Court said that

> Thus, where an insurer bases its entitlement not to defend a damage action upon the contention that the true facts are at odds with the allegations of that action, and those facts must of necessity be ultimately proved in the ensuing damage action, the court should exercise its discretion and refuse to entertain a dec-

> laratory judgment suit. Except in unusual cases, the court should normally also refuse to consider a declaratory judgment action prior to the filing of a damage suit against the insured, where the issue under the former necessitates a determination of the causation of the accident. The reason for such a conclusion is found in the fact that the basis of the insurer's liability will be determined by the proofs adduced in the damage action, and it cannot be ascertained in advance of trial what grounds of liability, if any, will be adjudicated against the insured. [44 *N.J.* at 512, 210 A.2d 221.]

Note that this court, in *CPS Chemical Co., Inc. v. Continental Ins. Co., supra,* and, more recently, in *Heldor Indus. v. Atlantic Mut. Ins., supra,* has held that where there are unresolved, critical factual issues the insurers are within their rights to deny a defense and await resolution of the coverage issue. We reverse the judgment against General Accident as to counsel fees and costs based on its alleged duty to defend.

Affirmed on the appeal; reversed on the cross-appeal.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, BERGEN COUNTY

DOCKET NO. C-3956-85

MORTON THIOKOL, INC.,

Plaintiff

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, ET AL.,

Defendants

Civil Action

DECIDED: August 27, 1987

FILED
WITH THE COURT
AUG 27 1987
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U.S.C.

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HUOT, J.S.C.

Plaintiff instituted this action against the insurance companies named herein seeking a declaration that certain of said companies are liable for the cost of defense expended in connection with a prior lawsuit entitled, *State of New Jersey, Department of Environmental Protection v. Ventron Corporation, et al.*, which was tried in this Court under Docket No. C-2996-75 and for the indemnification of all sums that plaintiff may be required to expend pursuant to the decision of that Court. The decision of the Trial Court in that case was reviewed by the Appellate Division and the Supreme Court of New Jersey.

The *Ventron* case determined the responsibility for the cost of cleanup and removal of mercury pollution seeping into Berry's Creek from land which was saturated by an estimated 268 tons of toxic waste which was accumulated as a result of a mercury processing operation carried on there for almost fifty years.

From 1929 to 1960, F.W. Berk and Co., Inc. operated a mercury processing plant and dumped untreated waste materials onto the property and allowed mercury-laden effluent to drain on and over the land through open drainage ditches. In 1960, Wood Ridge Chemical Corporation was formed by, and as a wholly owned subsidiary of, Velsicol Chemical Corporation. Wood Ridge purchased Berk's assets and operated the mercury processing plant and continued to dump material on the property in the same way.

In 1968, Velsicol sold all of the stock of Wood Ridge to Ventron Corporation. Ventron engaged Metcalf and Eddy to study the effects of the mercury on the and and constructed a weir to aid in monitoring the effluent. In 1970, EPA tests showed that two to four pounds of mercury went into Berry's Creek each day. Additional efforts by Wood Ridge diminished, but did not halt the flow of mercury into the creek. Operations at the plant ceased in 1974 when Wood Ridge was merged into Ventron and

Ventron assumed the liabilities and obligations of Wood Ridge.

The Trial Court and Appellate Division imposed "strict liability" on Wood Ridge under common law principles for causing a public nuisance and for "unleashing a dangerous substance during non-natural use of the land." 182 *N.J. Super* at 219. The Supreme Court affirmed, holding that "those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for resultant damages." 94 *N.J.* at 488. The Court concluded that "mercury and other toxic wastes are 'abnormally dangerous' and the disposal of them, past or present, is an abnormally dangerous activity." The Court further held that "the unavoidable risk of harm that is inherent in it requires that it be carried on at (the disposer's) peril rather than at the expense of the innocent person who suffers harm as a result of it." The Supreme Court concluded "that defendants have violated long-standing common law principles of landowner liability" (*Id.* at p. 493) because they were at all times engaged in an abnormally dangerous activity, i.e. dumping toxic mercury. The Court found Berk, Wood Ridge, Velsicol and Ventron liable "for the abatement of the resulting nuisance and damage." In addition to a public nuisance as a grounds for liability, the Supreme Court also found liability against Berk, Wood Ridge and Velsicol under the Spill Act and Ventron liable on its express assumption of the liabilities of Wood Ridge. It is apparent, however, that the Supreme Court based liability on the creation and maintenance of a public nuisance, not on violation of the statute. It recognized that "the Spill Act not so much changed substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and common law." *Id.* at p. 499.

The Judgment of the Trial Court was entered on November 15, 1979, and ordered:

a. The State to prepare a cleanup plan within 60 days and to serve a copy thereof on the defendants. The defendants were allowed 30 days thereafter to file reply papers. The Court would finalize the plan and then issue a mandatory injunction for implementation of the cleanup plan.

b. Velsicol to prepare and file a plan for development or surfacing of the tract to prevent surface water runoff, including a timetable and cost estimate. The State would have 30 days thereafter to file reply papers. The Court would finalize the plan and issue a mandatory injunction for implementation.

c. The State to decide if it desired to monitor Berry's Creek and after the submission of a monitoring plan and reply, the Court would finalize the same and issue a mandatory injunction for implementation. The cost of monitoring would be at the expense of the State, initially.

d. If monitoring shows continued pollution, the Court would order remedial measures.

e. The cost of the remedial relief imposed or to be imposed to be borne by the defendants, except that Velsicol would be solely liable for the cost of surfacing its property and the cost of monitoring would be borne initially by the State.

f. The Court required Velsicol and Ventron to post a bond of $1,000,000 each.

Subsequent to the action of the Supreme Court substantially affirming the Trial Court's Judgment, plaintiff instituted this action.

The defendants have now moved for Summary Judgment and the plaintiff has cross-moved for Summary Judgment.

Chronologically, the first primary policy was issued by General Accident Insurance Co. of America on or about October 10, 1964. Neither side can produce the original or a copy of that policy, but General Accident has submitted a form policy which was in use at that time. (Exhibit Z7 of General's Appendix)

That policy recites that General Accident "agrees with the insured . . ."

> "Coverage D—Property Damage Liability—Except Automobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay . . . for damages because of injury to or destruction of property . . . caused by accident.
>
> "Policy Period, Territory. This policy applies only to occurrences or accidents which happen during the policy period . . ."
>
> "10. Notice of Accident or Occurrence. In the event of an accident or occurrence, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident or occurrence, the names and addresses of the injured and of available witnesses."
>
> "11. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

Rephrased, this contract of insurance obligated General Accident to pay damages for the injury to property caused by an accident which happened during the policy period.

The policy does not contain a definition of the word, "accident," however, the word has been in use for so long

that its meaning is not open to question. Its dictionary definition is:

> "Accident, n. 1. An undesirable or unfortunate happening, unintentionally caused and usually resulting in harm, injury, damage, or loss; casualty; mishap . . . 2. any event that happens unexpectedly, without a deliberate plan or cause. 3. chance; fortune; luck . . . syn. 1. mischance, misfortune, misadventure, contingency; . . . ant. 3. design, intent." The Random House Dictionary of the English Language, Unabridged Ed., 1979, p. 9.

"According to generally accepted definitions, as 'accident' is a sudden and fortuitous event, unexpected by the person to whom it happens." *Doria v. Ins. Co. of North America, et al.*, 210 *N.J. Super* 67 (App. Div. 1986.) The word is in general conversational use and describes a happening that was not expected, was not planned, was not anticipated.

Thus, the original policy insured against injury to property which injury was caused by an unexpected, unplanned and unanticipated event.

The mercury did not reach the ground on which the Wood Ridge plant was situate and operating through an unexpected, unplanned or unanticipated event. It went onto and into the ground by the acts of the employees by design. Thus, whatever injury was caused to the ground when the mercury was intentionally dumped, was not caused by accident.

The Court emphasizes that the wording of the policy insures against injury *caused by accident.* The focus is on the manner by which the injury is caused. The policy does not insure against an unexpected, unplanned or unanticipated result which proceeds from a deliberate act.

Thus, on the 1964 policy the Court concludes that there was no accidental cause of any injury to property and no

responsibility on the part of General Accident to pay any damages on behalf of the insured.

An endorsement to the 1964 policy amended the wording of the obligation undertaken by General Accident as follows:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage . . . caused by an occurrence . . ."

The definition of "occurrence" in the endorsement to the policy presents a different issue. That definition provides:

> "The word occurrence as used in this endorsement means an unexpected event or happening which results in injury to or destruction of tangible property during the policy period, *or* a continuous or repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period provided the insured *did not intend or anticipate* that injury to or destruction of property would result . . ." (Emphasis supplied.)

By the quoted definition, the word, "occurrence," has two meanings. The first clause of the sentence defines it as "unexpected event or happening," similar to "accident." A comma appears at the end of the first clause which is followed by the disjunctive *or*. Thus, the second clause gives an alternative definition of "occurrence" to mean continuous or repeated exposure to injurious conditions.

The definition of "occurrence" in all defendant's policies post-dating 1965 differs from that definition in the endorsement to the 1964 General Accident policy. The post-1965 policies define "occurrence" as:

> ". . . an accident, including continuous or repeated exposure to conditions, which result in . . . property

> damage neither expected nor intended from the standpoint of the insured."

The use of the disjunctive, nor, between the words expected and intended, requires that both conditions be fulfilled in order to find an occurrence.

The property here involved was certainly subject to continuous and repeated exposure to what the Supreme Court called an "abnormally dangerous" condition.

The question then is whether the insured, Wood Ridge, "neither expected nor intended" that damage to the property would result.

Expect is synonymous with anticipate. Anticipate means to realize beforehand, foresee, expect. (The Random House Dictionary of the English Language, Unabridged Ed., p. 64) Thus, we are concerned with a subjective state of mind. Since Wood Ridge was a corporation, the state of mind must be that of a responsible officer of the corporation. Self-serving statements of denial of intent are not controlling. In all matters wherein a subjective state of mind is an element of responsibility, the factfinder must infer a state of mind from the words and conduct of the party at the time of the event and such other demonstrative evidence as is available.

Here, there is ample demonstrative evidence to support the proposition that Wood Ridge had knowledge of the pollution prior to the inception of any policy at issue in this litigation. As far back as March 28, 1956, the New Jersey Department of Health noted that the effluents from the settling tanks on the Wood Ridge property were discharged into an open ditch which were, in turn, discharged into Berry's Creek (Exhibit 5, Gen'l. Acc. Appendix to Reply Brief). In a supplementary report, dated May 14, 1956, John Wilford, Senior Public Health Engineer, and T.P. Conlan, Public Health Engineer, "concluded that the combined effluent from this plant is unacceptable . . ." (Ex-

hibit 6, Gen'l. Acc. Appendix to Reply Brief.) A follow-up report of John Wilford, dated December 2, 1958, is most telling. In the first paragraph it states:

> "On the above date I visited the F.W. Berk and Company, Inc., Wood Ridge, New Jersey to ascertain the current status of their program for the treatment or disposal of their industrial wastes in order to eliminate pollution of Berry's Creek."

The letter (Exhibit 7, Gen'l. Acc. Appendix to Reply Brief) states further:

> "I stated that as this matter has been brought to their attention *over two years ago,* this Department has a right to expect some appreciable progress toward the elimination of this problem." (Emphasis supplied.)

The letter goes on to suggest the submission of designs for a treatment plant, among other things. No one denies that representatives of F.W. Berk & Company, Inc., were aware of the pollution problem in 1956.

Under date of March 4, 1960, the Division of Environmental Health of the New Jersey Department of Health sent a letter to F.W. Berk Co., Inc., Attention of Mr. J. Bratt, Vice-President (Exhibit C of General Accident Appendix). Enclosed with the letter was a copy of a report made by John Wilford, Principal Public Health Engineer, and Anthony Ricigliano, Senior Public Health Engineer of their inspection of the subject property on February 4, 1960. (Exhibit B, General Accident Appendix)

The report (Exhibit B) contains the following statement under the word, "history":

> "The pollutional aspect of this Company's waste first came to the attention of this department in 1956. The Company is very cooperative and is desirous of rectifying the present pollution."

The letter, (Exhibit C, General Accident Appendix) contains the following statement:

> "As the matter has been under consideration for several years it is imperative that definite progress be attained for the treatment of the waste or their discharge . . . unless such progress can be demonstrated in the immediate future we shall have no alternative but to serve formal Order to insure compliance with existing legislation."

As indicated, the letter and report were sent to Berk on March 4, 1960. Wood Ridge took over Berk on July 1, 1960. But, John Bratt continued as Vice President and General Manager of Wood Ridge, the same position he occupied with Berk. The property was again inspected on August 9 and 10 of 1960 during which time Mr. Bratt was interviewed by the Inspectors, Harry H. Hughes, Principal Public Health Engineer, and Robert L. Vincent, Public Health Engineer (Exhibit D, General Accident Appendix). The report advises that Wood Ridge "is now planning to construct its own treatment devices" and that "the first step will be neutralization tanks . . ."

In addition, Judge Lester found that all of the defendants in the *Ventron* case, i.e., Berk, Velsicol and Ventron, knew of the dangers of mercury. This finding was confirmed by the Supreme Court. *Id.* at 486.

The report of the inspection in August, 1960 (Exhibit D, General Accident Appendix) states that "Special studies have been made by Edward R. Grich, Inc., the recommendations of whom are under consideration. The final plan of treatment is expected to be neutralization, equalization, settling, oxidation and chlorination."

Despite the representations made by Mr. Bratt in August 1960, it was not until October 1964, that any work was begun.

A letter dated November 2, 1964, from Mr. Bratt to the Bureau of Public Health Engineering (Exhibit E, General Accident Appendix) recites:

> "Construction of an 8 inch tile sewer and collecting sump . . . was begun *last week.* (Emphasis supplied)

And further:

> "This treatment scheme is proposed by E.R. Grich on the basis of his *1959* work with our wastes." (Emphasis supplied)

Knowledge of pollution on the part of Wood Ridge is established. The only available conclusion is that with that knowledge, Wood Ridge realized, foresaw and anticipated, indeed, it knew that it was causing injury to the property and to Berry's Creek.

Wood Ridge was on notice of the damage being caused by the toxic mercury discharges and was, in fact, planning action to treat the waste prior to 1960. This is critical in that the earliest policies in issue incepted in 1960.

The only policy issued by Continental Casualty Company which is in issue in this litigation is policy number RD 9976735 (Ex. A, Continental's Appendix). That policy was issued to Velsicol, as the named insured, with a policy period of 1/11/60 to 1/11/61.

For the purpose of this Motion, General Accident concedes that it issued certain policies for the years 10/10/60 through 10/10/64. Declaration sheets and endorsements have been produced for the period of 10/10/64 to 10/10/71 (Ex. Y, General's Appendix). All other policies in issue incepted after 1960.

Wood Ridge had knowledge of the dangerous properties of mercury and knew that the land and Berry's Creek was being polluted. The Court concludes that the deliberate dumping of toxic mercury onto the land, while possessed

of that knowledge, constitutes an intent to injure that property as a matter of law.

The Court is aware of plaintiff's argument concerning intent and its reference to Judge Lester's conclusion. However, what Judge Lester actually said in his Opinion was:

> "Surely Berk and W.R.C.C. intended to and volitionally did manufacture mercury compounds and dump waste on the Velsicol property. However, the Court cannot find that the acts were done *with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur.* No such knowledge or intent may be imputed to defendants under an intentional tort theory." (Emphasis supplied)

The underlined words in the above quotation from Judge Lester's Opinion constitute the key to unravelling the misunderstanding of the issues of this case.

A review of the case law cited by plaintiff and defendants is instructive. In *Lyons v. Hartford Ins. Group,* 125 *N.J. Super* 239 (App. Div. 1973) *cert. denied,* 64 *N.J.* 322 (1974), a police officer, the insured, allegedly had fired a warning shot with his gun and in the process killed someone with the shot. His policy with Hartford excluded coverage for "bodily injury . . . which is either expected or intended . . ." *Id.* at 244. While factually distinct from the case at bar, the principle governing coverage under the exclusion bears on the question of intent.

The Court stated the principle as follows:

> "The general rule is that coverage exists under insuring and exclusion clauses identical or similar to the ones involved here for the unintended results of an intentional act, but not for the damages assessed because of injury which was intended to be inflicted." *Id.* at 245.

The Court stated further:

> "... where the intentional act has resulted in intended injury, even where the injury inflicted is different or more severe than intended, coverage has been denied. *Id.* at 246. See *Oakes v. State Farm Ins.*, 137 *N.J. Super* 365 (App. Div. 1975) *cert. denied*, 70 *N.J.* 142 (1976).

In *Ambassador Ins. Co. v. Montes*, 147 *N.J. Super* 286 (App. Div.), *aff'd*, 76 *N.J.* 477 (1978), the Appellate Division interpreted a comprehensive liability insurance policy issued by plaintiff to the insured. While the policy did not contain a specific exclusion from coverage for intended bodily injury, the Court approached the case as though the policy contained an exclusion from the civil consequences of one's intentional wrongdoing.

The Court adopted the rules of *Lyons* and *Oakes*, cited above, and utilized the definition of intent found in the Restatement.

> "The word 'intent' is used throughout the Restatement of this subject to denote that the actor desires to cause consequences of his act or that he believes that the consequences are substantially certain to result from it." Restatement, Torts 2d, Sec. 8a (1965).

The Court further stated:

> "While it may not be necessary that the actor intend the very consequences that occur, if he knows that injuries are certain or substantially certain to follow from his act and still goes ahead, it is the same in law as if he had, in fact, intended the end result." *Id.* at 292.

The *Ambassador* court concluded that in order to find that coverage does not exist, it should be shown that either:

> "(a) the insured had the specific intent to inflict the injuries that occurred, or (b) he knew the injuries were

substantially certain to follow the performance of the intentional act."*Id.* at 292.

The trial court in the underlying litigation either overlooked or was unaware of certain documents in arriving at its conclusion that Berk and Wood Ridge intended to dump hazardous substances but did not intend to pollute the waters of the State. The demonstrative evidence appended to the briefs submitted by plaintiff and defendants establishes otherwise. In addition, the trial court did not consider the general rule of law that one intends the consequences of his volitional acts. See *Lyons v. Hartford Insurance Group, supra; Ambassador Ins. Co. v. Montes, supra; Oakes v. State Farm Ins. Co., supra; Tal v. Franklin Mutual Ins. Co.,* 172 *N.J.* 112 (App. Div. 1980), *cert. denied,* 85 *N.J.* 103 (1980); *Hanover Insurance Group v. Cameron,* 122 *N.J. Super* 51 (Ch. Div. 1973).

The plaintiffs cannot say that they did not intend to pollute when they had knowledge of the consequences of their acts years prior to the inception of any policy in issue. As stated, the Supreme Court held that long-standing common law principles of landowner liability were violated. Based on the foregoing, the plaintiff had knowledge that the injury to property was, not only substantially certain to follow the performance of their intentional acts, but that such injury was, in fact, occurring. Public policy prohibits insurance indemnity for the civil consequences of one's intentional wrongdoing. *Lyons, supra* at 245. *Ruvolo v. American Casualty Co.,* 39 *N.J.* 490 (1963). *Allstate Insurance Co. v. Malec,* 99 *N.J.* 1 (1986). A contract for indemnification, by its very nature, eliminates volitional acts from coverage and, notwithstanding competing public policy arguments with respect to cleanup of hazardous waste sites, this after al, is a contract dispute. The question presented is strictly one of contractual interpretation.

Moreover, insurance provides financial protection against risks that may someday occur. Once a risk becomes a

certainty, it is no longer insurable. Any insurance acquired subsequent to the act, the harm and the notice thereof, is not valid as to those acts and that harm. *U.S. v. Conservation Chemical Co.*, 653 *F. Supp.* 152 (W.D. Mo. 1986); *Muller Fuel Oil v. Insurance Co. of North America*, 95 *N.J. Super* 564 (App. Div. 1967).

This Court disagrees with Judge Lester's findings in the above quoted passage with respect to intent. Moreover, since a finding of intent was not necessary for the Court to make its conclusions, the passage is dicta and, therefore, not binding on this Court. This Court concludes that the property damage to the Berk and Wood Ridge property does not constitute an "accident" or "occurrence" as defined in the policies in issue. The damage was expected and intended, not fortuitous as the plaintiffs argue. Plaintiff is not entitled to indemnification for the costs of cleanup and abatement of the nuisance.

I

Summary Judgment in favor of all defendant insurance companies except General Accident Insurance Company of America, is granted as to all Counts of the Complaint. As to General Accident, Summary Judgment is granted with respect to all Counts except where costs of defense are sought. The question of costs of defense will be discussed below.

II

Although this decision would make it unnecessary to rule on other issues raised by the parties, the Court discusses those questions. The Court recognizes that Appellate review will be sought and believes, in the event this Court is deemed to be in error by an Appellate Court and a remand for Trial is directed, that the Appellate Court should have the opportunity to also pass upon the other issues raised in these Motions.

A. Certain of the insurance companies, including General Accident, Continental, INA and Liberty Mutual, have interposed the argument that cleanup costs do not constitute property damage, but are equitable in nature and, therefore, fall outside the policy. Plaintiff contends that this "artificial distinction" has been rejected by the New Jersey Courts, citing *Lansco, Inc. v. Department of Environmental Protection,* 138 *N.J. Super* 275 (Ch. Div. 1975), *aff'd per curiam,* 145 *N.J. Super* 433 (App. Div. 1976), *cert. denied,* 73 *N.J.* 57 (1977).

By way of example, Liberty Mutual's policies providing coverage from 1975 to 1977 contain the following definition of "property damage:"

> ". . . (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom . . ."

The DEP did not sue for damages to the State property and Judge Lester did not award damages to the State for injury to its property. The State sought and received an Order for the cleanup of the land now owned by plaintiff. Money damages were not awarded to anyone by Judge Lester.

Defendants argue that insurance policies which limit recovery to "damages" do not afford coverage for injunctive relief, citing, among others, *Maryland Casualty Company v Armco Inc.,* 643 *F. Supp.* 430 (D.C. Md. 1986) and *Mraz v. Canadian Universal Insurance Company Ltd.,* 804 *F. 2d* 1325 (4th Cir. 1986).

Plaintiff contends that the decision in *Lansco* "forecloses any argument" (Plaintiff's Brief, p. 64), that an insured who is ordered to pay for cleanup costs has not paid damages for "property damage." Plaintiff's reliance is misplaced. In *Lansco,* the insured was ordered by the DEP to clean up any oil spill in the Hackensack River, pursuant

to the Water Quality Improvement Act, *N.J.S.A.* 58:10-23.1. The insured refused to pay the cost of cleanup, rationalizing that there was no injury to tangible property.

Defendants' argument that "coverage under the policy does not include damages recoverage by the State from *Lansco* in the State's sovereign capacity or under the public trust doctrine" *Lansco, supra* at 282, was found by the trial court to be without merit, stating that "it has long been established that the sovereign's interest in the preservation of public resources and the environment enables it to maintain an action to prevent injury thereto." *Id.* at 282. The question of whether injunctive relief was covered under the policy was never addressed by the Court.

Interestingly, plaintiff cites *Broadwell Realty Services Inc. v. Fidelity & Casualty Co. of New York,* Docket No. L-081194-84, slip op. (Law Division, Essex County, June 24, 1986), *appeal pending,* No. A-5301-85T7, in support of its proposition that cleanup costs constitute "property damage."

Subsequent to the arguments of May 14, 1987, in this action, the Appellate Division issued its opinion in *Broadwell,* Docket No. A-5301-85T7, slip op. (App. Div. July 2, 1987). In a case of first impression, the issue presented to the Court was whether abatement and cleanup costs constitute a claim for damages within the meaning of the policy language, when the measures that take place are on the insured's own property, in response to a directive by the DEP.

In *Broadwell,* hazardous substances had escaped from plaintiff's underground gasoline tanks and seeped onto adjacent lands, causing damage to two New Jersey Bell cable vaults. After complaints were received, the DEP undertook an investigation to determine the cause of the damage. Based on a hydrologist's report that the tanks were leaking into the cable vaults and into a nearby stream, the DEP issued a directive to the plaintiff to take immediate

cleanup action to stem continued migration of the gasoline. Failure to do so would result in treble damages.

Certain emergency recovery and cleanup operations were performed, whereby Broadwell incurred expenses of approximately $42,000. Globe Petroleum, the lessee of the property which operated a Citgo Service Station on the premises, was insured under a comprehensive general liability policy issued by defendant, Fidelity, with Broadwell named as an additional insured.

Plaintiff sought indemnification under the policy for costs incurred in the abatement of the continued seepage of gasoline and cleanup costs associated therewith. Defendant, Fidelity disclaimed liability, arguing (1) Plaintiff's cleanup efforts were designed to clean up and abate a deleterious condition created by the insured on its own property and (2) in any event, the discharge of gasoline was not "sudden and accidental' and, therefore, came within the pollution exclusion clause in the CGL policy.

At the outset, the Court in *Broadwell* made the following findings:

(1) Public policy arguments not withstanding, the questions presented are purely ones of contractual interpretation;

(2) Abatement measures designed to prevent the continued destruction of adjacent property are plainly compensable under the policy;

(3) Costs of a prospective cleanup operation constitute a claim for damages within the meaning of the policy language;

(4) The fact that preventive measures were taken on the insured's property rather than on adjacent lands has no legal significance and abatement remedies designed to prevent imminent damage to third parties cannot be denied on the basis of the owned property exclusion;

(5) To the extent that any or all of the response expenses pertain to damages solely on the Broadwell site and not to off-site contamination, the owned property exclusion applies and such damage is not covered by the policy.

The Appellate Division in *Broadwell* noted the practical difficulties of distinguishing between cleanup expenses attributable to correcting damage to the insured's property, which cannot be recovered, and those attributable to abatement of damage to adjacent lands which can be recovered.

It is now the law in New Jersey that costs incurred for cleanup and abatement of conditions which affect adjacent lands and waters, constitute property damage within the meaning of the policy language.

B. Certain defendants moved for summary judgment on the grounds that their policies contain pollution exclusion clauses which exempt pollution-related claims from coverage. There are five different forms of pollution exclusion clauses at issue. Plaintiff argues that the relevant clauses in all of the forms are ambiguous and, therefore, should be construed against the drafter.

By way of example, the Insurance Service Office (ISO) form states:

> "This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

Most of the controversy with respect to these clauses surrounds the interpretation of the words, "sudden" and

"accidental." The *Broadwell* Court has fully addressed the issue of the pollution exclusion clause, finding that the decisional law in New Jersey and other jurisdictions have tended to interpret the "sudden and accidental" exception as simply a restatement of the definition of "occurrence." The *Broadwell* Court stated that the "pollution exclusion focuses on the intention, expectation and foresight of the insured."

Having earlier concluded that no "occurrence" took place within the meaning of the policies based on the plaintiff's intent to pollute, further discussion of the clauses is unnecessary. As an aside, this Court notes that the long and well-documented history of dumping on the Berk and Wood Ridge premises could hardly be construed as "sudden.'.'

C. Plaintiff seeks to sustain coverage because property damage continued and continues to take place despite the fact that operations ceased in 1974. But, as the plaintiff states in its Brief, (p. 88) "whether or not an event is expected or intended is to be determined as of the time of the acts or omissions giving rise to liability, not at the time the injuries occur and not at the time a policy issued." Here, the acts giving rise to liability were intentional acts done at a time that knowledge of the pollution of Berry's Creek was possessed. There was no "occurrence" as defined by any of the policies.

Although damage to Berry's Creek continued during various policy periods, that damage was not caused by an "occurrence" which triggered coverage. The plaintiff argues that the word, "occurrence," is ambiguous. The Court does not agree. As Judge Long said in *Avemco Insurance Co., et al. v. U.S. Fire Ins. Co., et al.*, 212 *N.J. Super* 38 (App. Div. 1986), "we note initially that it does not necessarily follow that because several different interpretations of the language of an insurance policy are advanced that the policy is ambiguous. The nature of things, parties will urge the court to 'interpret' policy language to suit

their theory of a case regardless of the clarity of the actual language involved." That is what is occurring here. But, the Court finds no ambiguity in the language. The events consisted of repeated and ongoing dumping of toxic waste with knowledge of the effect of that dumping. That harm to Berry's Creek, continued because of seepage, does not create an ambiguity in the meaning of the word, "occurrence."

D. Plaintiff's discussion with respect to a "trigger of coverage" misses the point. The *Solvents Recovery* case, relied on by plaintiffs, is factually distinct because there the Court found leakage from drums which contained the contaminants, not a deliberate discharge as in the *Ventron* case.

If the discharge by Ventron had been one which could be described as an "occurrence," this Court would agree that the defendants herein would be obliged to furnish coverage because the discharges occurred during all policies issued until them termination of operations at the plant. By the same token, any policies issued after the discharges ceased would not have provided coverage. This is all academic, however, because the Court concluded there was no "occurrence" as defined by the policies.

The conclusion that the acts of Ventron, et al., were deliberate and intentional with full knowledge of the result to be occurred by such acts equally calls into play the exclusion clauses set forth in the various policies. No discharge was sudden and accidental.

E. The plaintiff also argues that the finding of a nuisance by the *Ventron* Court brings its claims against these defendants under those portions of the policies which provide coverage for personal injury.

The particular clause relied upon is set forth on page 121 of plaintiff's Brief. The policy insures against damages which become due if the insured commits a wrongful entry

or eviction, or other invasion of the right of private occupancy.

It is not necessary to repeat the facts of the underlying Ventron case to understand that the waters of Berry's Creek are public property. Thus, there cannot be an invasion of private occupancy or private possession.

Similarly, eviction means a dispossession through legal process. The State was not dispossessed of the waters of Berry's Creek.

Wrongful entry with respect to real estate is the going upon land for the purpose of taking possession of it. Here, no one sought to take possession of Berry's Creek, neither the land that forms its bed, nor the waters flowing through it.

The plaintiff has confused the concept of trespass with wrongful entry. Its argument that the common law distinction between nuisance and trespass has been blurred has no relevance to the insurance contract clause with respect to "personal injury." Wrongful entry, eviction and occupancy all have to do with the possession of property. The seepage of toxic waste has nothing at all to do with the possession of Berry's Creek. The personal injury clause of the policies do not provide coverage to plaintiff.

F. The defendants argued for Summary Judgment based upon a claim of late notice. There was no prejudice to any carrier shown by receipt of late notice. In addition, with respect to INA and CNA, there would be a factual question as to the position of Marsh & McLennan as agent or broker.

G. Defendants' argument that the cost of cleanup of plaintiff's property is barred by the owned property exclusion has been determined by the Appellate Division in *Broadwell Realty Services, Inc. v. The Fidelity & Casualty Company of New York and Globe Petroleum Inc.*, supra:

> "To the extent that all or a portion of the response expenses pertain solely to damage to the Broadwell site itself and not to prevent off-site contamination, the owned property exclusion clearly applies, and such damage is not within the coverage provided. We recognize that it may be extremely difficult to segregate and distinguish between cleanup expenses attributable to connecting damage to Broadwell's property, which are not recoverable, and those attributable to abatement of damage to adjacent lands, which are."

By substituting plaintiff in the place of Broadwell, the cited passage is equally decisive in this case.

III

Although the Court has concluded that the defendants are not obliged by their contracts to indemnify the plaintiff for the costs of cleanup, that conclusion is not applicable to the obligation of General Accident to provide a defense to the original Ventron action. A review of the Complaint filed by the Department of Environmental Protection in Docket No. C-2996-75 leads to the conclusion that General Accident should have provided a defense. The Court agrees that the relief sought in Counts 2 and 3 of that Complaint would not require the carrier to provide a defense, however, the allegations and demand set forth in Count 1 do require such defense.

Count 1 alleges that mercury and other hazardous substances "have leaked, dripped, spilled and discharged" onto and into the property of Ventron and thereafter into State waters. There is no allegation that such conduct was deliberate, intentional or accidental, but merely that it occurred. Based upon the allegations of Count 1, the duty to defend arose. Thus, General Accident's Motion to Dismiss plaintiff's claim for costs of the defense of the Ventron case is denied. The legitimate and reasonable costs of such defense shall be a matter for trial.

IV

Defendants, Mission Insurance Company and Mission National Insurance Company, have moved for a stay of these proceedings based on an Order of the Superior Court of California appointing liquidators for these defendants. Based on this Court's ruling, it is unnecessary to decide the Motion.

V

For the reasons set forth at the beginning of this Opinion, the Motions of the defendants for Summary Judgment with respect to the duty to indemnify plaintiff for the cleanup costs to be assessed in the *Ventron* case, are granted. General Accident's Motion insofar as it applies to costs of defense of the *Ventron* case is denied.

Mr. Wachenfeld will please prepare the Order, consented to as to form, or under the five-day Rule, and submit the same to the Honorable Kevin M. O'Halloran, J.S.C., for signing.

/s/ Paul R. Huot
PAUL R. HUOT, J.S.C.

APPENDIX C

SUPREME COURT OF NEW JERSEY
M-258 SEPTEMBER TERM 1992

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Appellant
and Cross-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, etc.,
Defendants-Respondents
and Cross-Appellants.

ORDER
FILED
JUL 25 1993
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of the Attorney General of New Jersey for leave to expand the record is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of July, 1993.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-256 SEPTEMBER TERM 1992

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Appellant
and Cross-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, etc.,
Defendants-Respondents
and Cross-Appellants.

ORDER
FILED
JUL 23 1993
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of Aetna Casualty & Surety Company for leave to expand the record is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of July, 1993.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-77 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

ORDER
FILED
SEP 10 1993
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of Insurance Company of North America for an extension of time to file a motion for reconsideration is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of September, 1993.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-338 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Movant,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the opinion is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-337 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant-Movant.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the opinion is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-340 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

and

UNDERWRITERS AT LLOYDS, LONDON,
Defendant-Movant.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the opinion is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-339 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

and

AFFILIATED FM INSURANCE COMPANY,
Defendant-Movant.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-581 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant-Movant.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion to expand the record is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-622 SEPTEMBER TERM 1993

34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

ORDER
FILED
JAN 13 1994
Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of Aetna Casualty and Surety Company for leave to file a supplemental brief is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of January, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF THE UNITED STATES

No. A-810

Insurance Company of North America, et al.,
Petitioners

v.

Morton International, Inc.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 13 , 1994.

/s/ DH Souter
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of March, 1994.

SUPREME COURT OF THE UNITED STATES

No. A-810

Insurance Company of North America, et al.,
Petitioners

v.

Morton International, Inc.

CORRECTED ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 13, 1994.

/s/ DH Souter
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of March, 1994.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION

Docket No. C-3956-85

MORTON THIOKOL, INC.,

Plaintiff,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO CERTAIN CARRIER DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

* * * *

Accordingly, in determining the applicability of the ISO form, the crucial question is whether the insured intended or expected the harm for which it seeks coverage. Moreover, in answering that question, the court should apply a subjective standard, *i.e.*, whether Plaintiff actually expected or intended the harm for which it seeks coverage.

Respectfully submitted,

ARCHER & GREINER
A Professional
Corporation
Attorneys for Plaintiff
Morton Thiokol, Inc.

By: /s/ Edward C. Laird
Edward C. Laird

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC., successor to Morton Thiokol, Inc., now named Thiokol Corporation,
Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,
Defendants-Respondents.

CROSS APPEAL FROM JUDGMENT OF APPELLATE DIVISION

REPLY BRIEF OF DEFENDANT-RESPONDENTS/CROSS-APPELLANTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES

• • • •

We would distinctly prefer that the Court reject reliance on the regulatory history because it is inadmissible and because on their face the documents do not support the interpretation that *Broadwell* gave them. If, however, this Court found that it was inclined to accept the representations from other cases about what the documents showed, we specifically challenge the accuracy and completeness of the "evidence" and would request a plenary hearing.[11]

* * * *

Dated: June 29, 1992

[11] Judge Huot did not allow discovery on extrinsic evidence in the trial court and did not hear evidence on the drafting of the pollution exclusion. Likewise, in *Broadwell* there was no discovery or plenary proceeding with respect to extrinsic evidence.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,
Plaintiff-Petitioner,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, LIBERTY MUTUAL INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, FIRST STATE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, UNDERWRITERS AT LLOYDS, LONDON and LONDON MARKET COMPANIES,
Defendants-Respondents,

and

AETNA CASUALTY & SURETY COMPANY, *et al.*,
Defendants.

ON GRANT OF CERTIFICATION FROM THE FINAL JUDGMENT OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

PETITIONER'S BRIEF IN OPPOSITION TO *AMICUS* AETNA'S MOTION TO EXPAND THE RECORD BELOW

• • • •

Morton could understand, particularly in light of the findings of the West Virginia Supreme Court in *Joy Tech-*

nologies, that this Court might be interested in receiving more information on the pronouncements of the insurance industry to state insurance commissioners, particularly those representations made here in New Jersey, at the time the pollution exclusion clause was proposed.[4]

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Plaintiff-
Petitioner, Morton International,
Inc.

BY: /s/ Edward F. Kugler, Jr.
GEORGE F. KUGLER, JR.
EDWARD C. LAIRD

Dated: July 8, 1992

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ON THE BRIEF:

GARY J. LESNESKI

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[4] *Amicus* New Jersey League of Municipalities has reproduced the IRB's June 10, 1970, submission to the New Jersey Insurance Commissioner representing, as it had in West Virginia, that the pollution exclusion clause "clarifies" existing coverage (*See* Appendix of *Amicus Curiae* New Jersey League of Municipalities, Exhibit "J"). This evidence would, in Morton's view, be a proper subject for judicial notice under New Jersey Evidence Rule 9. The Court can readily contrast this use of public filings with Aetna's failure to reference this material in its motion, in favor of citation to an *internal* ISO memorandum that purports to interpret the public submission (*See* Aetna's Memorandum In Support, at 8; Asa 845).

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC., successor to Morton Thiokol, Inc. now named Thiokol Corporation,
Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,
Defendants-Respondents.

CROSS APPEAL FROM JUDGMENT OF APPELLATE DIVISION

BRIEF IN ANSWER TO *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

* * * *

A. It Is Fundamentally Unfair To Supplement The Record With Extrinsic Evidence Which Is Incomplete, Unnecessary And Raises Questions Of Fact

The pollution exclusion is clear and unambiguous and should be interpreted without any resort to extrinsic evidence. (Brief at 11-15, 20-24, 42-47)[1] Thus, the State's

[1] References are to the Brief of Defendants-Respondents/Cross-Appellant Insurance Company of North America, American Home Assurance Company, Liberty Mutual Insurance Company, Underwriters at Lloyd's London, and London Market Insurance Companies.

reliance upon purported extrinsic evidence should be rejected as a matter of law.[2] In any event, it is fundamentally unfair for this Court to interpret the pollution exclusion based upon a small sampling of extrinsic evidence selected by the State, especially where such purported evidence is incomplete and raises questions of fact.

The State unfairly seeks to rely on snippets of a few regulatory history documents (which it selected) in arguing that the pollution exclusion is ambiguous and, therefore, synonymous with the occurrence definition. Not only is it far too late in the day to be introducing these selectively chosen documents, the State also misinterprets the very documents it has selected. Admitting the documents as evidence will not resolve what their drafters intended or what the drafters of the pollution exclusion intended. The State simply asks the Court to accept its own interpre-

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[2] Similarly, the Court should give no credence to the "scholarly" commentaries relied on by the State. The "Chesler" commentary the State so heavily relies upon was authored by counsel who routinely represents policyholders in environmental insurance litigation. *See* State's Br. at 24, 25, 26 and 31. Indeed, Mr. Chesler's firm, Lowenstein, Sandler, Kohl, Fisher & Boylan, represents policyholder *amicus* Westinghouse Electric Corporation in this appeal.

Our brief also refers the Court to published commentaries by insurer counsel. We cite to these articles not as authority, but rather as a proffer of the types of evidence which are available should the need for an evidentiary hearing arise. *See The Emperor's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence*, 6 Mealey's Insurance Litigation Reports No. 25 (Part One) (May 5, 1992) and (Part Two) (May 12, 1992) and *The Occurrence Definition And Extrinsic Evidence: The Diogenesian Search For The Reasonable Man*, 6 Mealey's Insurance Litigation Reports No. 31 (June 16, 1992). *See* supplementary appendix of *amicus curiae* Aetna Casualty and Surety Company (hereinafter "Asa") at Asa37-74, Asa75-108 and Asa108-126 respectively. *See also The West Virginia Regulatory Filings and Extrinsic Evidence Of The "History" Of The Pollution Exclusion*, 6 Mealey's Insurance Litigation Reports No. 47 (October 20, 1992). These articles are hereinafter referred to as *"Emperor's Illusionist"*, *"Occurrence Definition"* and *"West Virginia Regulatory Filings"* respectively.

tation of these documents. Even if extrinsic evidence were admissible, it is fundamentally unfair to let one side put its gloss on a few documents which it has chosen—without allowing the other side an adequate opportunity to challenge that interpretation with its own evidence and, where appropriate, by taking testimony of the authors and recipients. The insurers have not been given that opportunity. This Court is not a trial court, and it should not be lulled into becoming a finder of hotly contested factual issues that were never considered by the trial court, *i.e.*, what particular documents mean.

Nor should the Court make a decision based on an incomplete or one-sided record. A court which resorts to extrinsic evidence should do so on a complete record fairly contested by the parties. Even where it is relevant and admissible, extrinsic evidence should not be considered unless to rebut unfavorable evidence. That is why it is doubly unfair to admit extrinsic documentary evidence directly into an appellate record and to do so after the close of briefing by the parties. Even a preliminary review of the State's use of regulatory documents illustrates the dangers of admitting evidence in a setting where it cannot be challenged. Sections B and C, *infra*, discuss how the State misreads the very documents it relies upon when it incorrectly contends that the introduction of the occurrence policy in 1966 resulted in a rate increase.

* * * *

The State's introduction at this time of a few hand picked twenty-five year old documents demonstrates the dangers presented by the unquestioning acceptance of extrinsic evidence. The documents proffered by *amicus curiae* Aetna Casualty and Surety Company demonstrate that there is another side to the drafting history and regulatory history story presented by the State. The explanations provided by the State of its documents raise questions of fact which should not be resolved on appeal. Fact finding

is the job of the trial court, not this State's highest Court.[5] If this Court must go beyond the plain language of the pollution exclusion to reach its conclusion, then the matter should be remanded. It is for the trial court to make a finding of fact based on a real record composed of all relevant documents, not a select few, and the testimony of documents' drafters, not a lawyer's interpretation. It is the trial court's interpretation of what the evidence shows which would then be reviewed by this Court.[6]

* * * *

---

[5] This is the fundamental error committed by the West Virginia Supreme Court in *Joy Technologies v. Liberty Mutual Insurance Co.*, No. 20153 (W. Va. June 11, 1992). The West Virginia Supreme Court undertook to review documents from the West Virginia Insurance Department's July 1970 hearing on the pollution exclusion. It did not have the benefit of any fact finding by the trial court concerning the true facts and circumstances from the document drafters. Instead it conducted a *de novo* review and reached a conclusion which, as discussed, *infra*, was subsequently contradicted by Samuel Weese, the West Virginia Insurance Commissioner at the time of the hearing.

[6] The State's use of extrinsic evidence should also be rejected because there is no proffer by the Attorney General that the documents offered represent the entire files maintained by the Insurance Department in connection with the regulatory materials. A cursory review suggests that the files are incomplete. For example, document numbers 31, 32 and 33 state that the Insurance Department requested a legal opinion, presumably from the Attorney General's office, before approving the pollution exclusion. The legal opinion is not among the documents offered by the State.

CONCLUSION

For the foregoing reasons, the undersigned insurers request that the Court not accept the extrinsic evidence submitted by the State of New Jersey because the plain language of the pollution exclusion is clear and unambiguous. Even if the Court believes there should be a resort to regulatory history and drafting history, fairness dictates that the matter be remanded for an evidentiary hearing or a full record. Finally, the State fails to set forth any logical basis to rebut the trial court's and the Appellate Division's conclusion that the intent to injure could be inferred from Thiokol's fifty years of polluting activity.

Dated: November 12, 1992

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC., successor to Morton Thiokol, Inc., now named Thiokol Corporation,
Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,
Defendants-Respondents.

CROSS APPEAL FROM JUDGMENT OF APPELLATE DIVISION

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

* * * *

The Steen affidavit, which is attached as Appendix A, shows that the Department, in fact, understood that from the policyholders' and regulators' point of view the exclusion was *both* a clarification *and* a restriction in coverage. Steen also explains the approval process and a number of important public policy considerations that were reviewed by the Department in light of the apparent restrictions in coverage:

> I also had no particular problem in discerning that—*from a contractual standpoint*—the filings introduced specific new exclusionary language

> that was sufficiently important to be evaluated not only in terms of contractual effect but, also, in terms of public policy considerations. Our thoughts ran along many lines, such as: should polluters be protected from the economic consequences of their intentional acts through insurance; should payment through insurance be available where the polluter cannot pay; should insurers pay, but have contractual recourse against the insured; should it be a basic coverage whose cost would be borne by all insureds? (Steen Aff. ¶ 6).

Steen's testimony is supported by contemporaneous documents that were missing from the Department's files when requested by the insurer parties but which appeared for the first time after briefing and oral argument of this appeal. One of these documents, an April 20, 1970 memorandum by Steen, expressly recognized the potential restrictive effect of the exclusion, stating that "for some risks without adequate financial resources to pay the costs of such losses, this exclusion may transfer the burden of the cost to public governmental agencies." (Appendix D, Cert. Ex. D). Another belatedly disclosed document is a legal opinion by Walter Davis, a Director with the Department, which recommended that the exclusion be disapproved *because of its obvious restrictive effect.* (Appendix D, Cert. Ex. M). These documents and the Steen affidavit both undercut the central premise of the Court's decision and warrant reconsideration since they were not available to the carriers when the case was briefed and argued.

Reconsideration is also particularly appropriate because, contrary to the Court's apparent impression, the affected insurers have never had their day *in any court in the country.* Not one of the handful of decisions that have discussed the "regulatory history" has even given the carriers a chance to defend themselves against these allegations. Given the importance of the Court's decision, the

fact that relevant documents sought by the insurers from the Department were never available to them, and the availability of new testimony that should fairly have been considered in conjunction with the allegations against the insurers, due process requires that the Court reconsider and give the insurers a chance to defend themselves against these most serious allegations.

The Court's decision to estop an entire industry from relying on the plain meaning of the pollution exclusion is particularly unfair because of its dramatically adverse impact on entirely innocent parties. The decision will bind insurance companies, such as INA, who were not members of the IRB when the exclusion was submitted in 1970, but who subsequently adopted the exclusion in reliance on the Department's approval. Indeed, many companies using the standard pollution exclusion did not even exist in 1970. By rejecting the insurers' pleas for a hearing, the Court not only renders a decision of far-reaching consequences without a fully developed record, it also proceeds in a manner that is so fundamentally unfair as to violate the due process requirements of the New Jersey and United States Constitutions.

The Court relies upon its decision in *Harr v. Allstate Insurance Co.*, 54 N.J. 287 (1969), for the application of estoppel to void particular insurance contract language because of a misrepresentation of policy coverage. The Court overlooks that in *Harr*, even though a *prima facie* case for estoppel had been established, the Court directed that the carrier was entitled to a remand to present its own evidence. The carriers have not had a fair opportunity to address the estoppel issue. As in *Harr*, due process and this Court's tradition for fundamental fairness require that the carriers be given a hearing.

* * * *

POINT IV

IT IS FUNDAMENTALLY UNFAIR TO INVOKE ESTOPPEL WITHOUT A HEARING OR AGAINST PARTIES WHO DID NOT PARTICIPATE IN THE 1970 FILINGS

The due process requirements of the United States and New Jersey Constitutions mandate that the carriers be permitted to produce evidence in their defense and be provided with a hearing before such a drastic remedy as estoppel can be invoked against them.

The Court need look no further than its teaching in *Harr v. Allstate Insurance Co.*, 54 N.J. 287 (1969), for the proposition that even though a *prima facie* case of estoppel may have been made out on appeal, the insurers are entitled to a trial on remand so that they can produce evidence in their defense. *Id.* at 310. *Harr*, like the present case, involved a situation in which the insurer prevailed on summary judgment in the trial court and in the Appellate Division. This Court reversed, concluding that the policyholder had made out a *prima facie* case of estoppel which would bar the carrier from denying coverage. *Id.* The Court recognized, however, that the insurer was entitled to put on a defense. Indeed, even though at oral argument the defendant insurer's counsel admitted that he could not then determine what evidence he could produce at trial, this Court recognized that "[d]efendant's proofs may be so substantial when all the evidence is in that plaintiffs will not be entitled to judgment." *Id.* at 308.

A. The Carriers Were Deprived Of Their Due Process Right To A Fair Evidentiary Hearing

The Court denied the insurers their Fourteenth Amendment rights to due process when it estopped the entire insurance industry from relying on the "literal terms" of the pollution exclusion without the opportunity to present a fully developed factual record and to rebut the evidence upon which the Court relied.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In *Fuentes*, the Supreme Court noted:

> [W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Id. at 81. The fundamental due process right to a hearing embraces the right to present evidence and to confront and to cross-examine adverse evidence. *Green v. McElroy*, 360 U.S. 474, 497 (1959).

> Certain principles have remained relatively immutable in our jurisprudence. . . . We have formalized these protections in the requirements of confrontation and cross-examination . . . This Court has been zealous to protect these rights from erosion . . . It has spoken out not only in criminal cases [cites omitted] . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

Id. at 496-97. The due process values embodied in Article I, paragraph 1 of the New Jersey Constitution require no less. *Ledezna v. A&C Drywall*, 254 N.J.Super. 613, 618 (App. Div. 1992).

Saunders v. Shaw, 244 U.S. 317 (1917), is directly on point with the facts of the present case. In *Saunders*, the Supreme Court reversed a decision by the Louisiana Supreme Court because the state's highest court had unconstitutionally denied a request for an evidentiary hearing on whether a parcel of property was subject to a tax assessment. *Id.* at 319. The state court had denied a hearing because it believed that the legality of the assessment "was so plain on the uncontroverted facts [and] . . . to

remand [the case] would be an empty form—a mere concession to technically." *Id.* Justice Holmes highlighted the constitutional infirmity in the state court's reasoning:

> It *may* turn out so, but we do not see in the record an *absolute warrant* for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Id. (emphasis added).

As shown above, this Court erroneously assumed that the record contained all important evidence regarding the regulatory history of the pollution exclusion. The Court's determination that it would be "redundant" to remand the case for an evidentiary hearing violated the insurers' due process rights under the Fourteenth Amendment. *See Fuentes,* 407 U.S. at 90, n.22 ("A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. . . . But these rather ordinary costs cannot outweigh the constitutional right"); *Bell v. Burson,* 402 U.S. 535, 540-41 (1971) ("Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process").

Where, as here, the nature of the deprivation could be potentially enormous for the injured party, the necessity for a prior and meaningful opportunity to challenge adverse evidence through the fundamental truth-finding process of cross-examination is especially compelling. *See, e.g., Boddie v. Connecticut,* 401 U.S. 371, 378 (1970) ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings").

The carriers respectfully request that this Court allow a meaningful opportunity for the insurers to be heard and to present evidence on the regulatory history of the pollution exclusion. Time and time again the Supreme Court has reaffirmed the fundamental due process requirement that "wherever one is assailed in his person or his property, there he may defend." *Boddie*, 401 U.S. at 377 (quoting *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876)).

* * * *

D. It Is Fundamentally Unfair To Invoke Estoppel Against A Party Which Did Not Participate In The 1970 Filing Or Did Not Even Exist In 1970

INA was not a member of the IRB at the time of the filing of the standard "sudden and accidental" pollution exclusion in 1970. Indeed, INA submitted and used for many years its own form of the pollution exclusion. Other insurance carriers, such as Columbia Casualty Company, did not even exist in 1970. Subsequent to 1970, however, INA, Columbia Casualty and numerous other insurers have utilized the "sudden and accidental" exclusion construed by the Court. It is fundamentally unfair to invoke the doctrine of estoppel against INA, Columbia Casualty, and other similarly situated insurance companies.

* * * *

Dated August 30, 1993

Respectfully submitted,

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Mutual Insurance Rating Bureau

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June 10, 1970

Hon. R.L. Clifford, Ins. Comm.
Dept. of Ins., State of N.J.
State House Annex
Trenton, N.J. 08625

Manuals of Liability Insurance
Contamination or Pollution Exclusions

Dear Sir:

The Bureau is submitting on behalf of our members and subscribers and to the extent required by applicable statute or regulation, contamination and pollution exclusions that will apply to all general liability insurance covering bodily injury and property damage except comprehensive personal and farmers comprehensive personal liability and professional liability insurance. An explanation of the exclusions is contained in the attached memorandum.

We anticipate in the next few days to submit appropriate endorsements to implement the introduction of the above exclusions.

It is proposed that this revision become effective July 29, 1970 in accordance with the following rule of application:

> These changes are applicable to all new an renewal policies written on or after July 29, 1970 and to all policies written before July 29, 1970 which will become effective on or after October 1, 1970. No policy effective prior to July 29, 1970 shall be endorsed or canceled and rewritten to

take advantage of, or to avoid the application of these changes except at the request of the insured and at the customary short rate charges as of the date of such request but in no event prior to July 29, 1970.

Since there is a great concern by the companies for the adoption of these exclusions, we respectfully request your favorable consideration of this submission. In order to facilitate transmittal of your acknowledgment or approval, an extra copy of this letter, together with a stamped, self-addressed envelope are enclosed.

Very truly yours,

/s/ D.E. Kuizensa
Secretary

Mutual Insurance Rating Bureau
Memorandum-Manuals of Liability Insurance

Contractual Liability Manual
Manufacturers' and Contractors' Liability Manual
Owners', Landlords' and Tenants' Liability Manual
Owners' or Contractors' Protective Liability Manual
Product Liability Manual

Page No.

Cont. 6, M & C 4b, OL & T 5 & 200, OCP 6, Prod. 4b

Add the following as contractual exclusion (n), manufacturers' and contractors' exclusion (q), owners', landlords' and tenants' exclusion (r), storekeepers' exclusion (p), owners' or contractors' protective exclusion (j) and products exclusion (k):

> Contamination or Pollution Exclusion. Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Cont. 6, M & C 4b, OL &T 5 & 200, OCP 6, Prod. 4b

Add the following as contractual exclusion (o), manufacturers' and contractors' exclusion (r), owners', landlords', and tenants' exclusion (s), storekeepers' exclusion (q), owners' or contractors' protective exclusion (k) and product exclusion (l):

> Contamination or Pollution—Described Operations-Supplementary Exclusion. With respect to the operations described below, bodily injury or property damage arising out of the discharge,

dispersal, release or escape of oil or other petroleum substance or derivative (including any oil refuse or oil mixed with wastes) into or upon any watercourse or body of water, whether or not such discharge, dispersal, release or escape is sudden and accidental.

Description of Operations

Gas Lease Operators—natural gas
Gasoline Recovery—from casing head or natural gas
Non-operating working interests
Oil or Gas Wells—Shooting
Oil or Gas Wells—acidizing
Oil or Gas Wells—cementing
Oil or Gas Wells—cleaning or swabbing—by contractors
Oil or Gas Wells—drilling or redrilling, installation or recovery of casing
Oil or Gas Wells—instrument logging of survey work in wells
Oil or Gas Wells—Perforating of casing
Oil Lease Operators
Oil Pipe Lines—operation, including maintenance
Oil Rig or Derrick Erecting or Dismantling—wood or metal—including construction of foundations or structures or installation of equipment

Explanation

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

This exception for oil is justified, in our opinion, because oil spillage into water is a catastrophic phenomenon of recent occurrence and not contemplated when existing rates were made. The public has become increasingly aware of agonizing effects of oil spillage and resentful of the failure of oil risks to take the ordinary step to avoid them. To ignore the attitude of society toward the destructive effects of oil spillage by making insurance readily available, as part of underlying coverage, without regard for the exposure could be interpreted as a disregard for the public interest and the public policy, and could well subject the insurance industry to public criticism. Because of this situation any companies that may afford this insurance will undoubtedly do so only after a very carefully survey of the exposure and the methods for preventing oil spillage into water in order to assure protection for the public interest.

APPENDIX E

AFFIDAVIT OF JEROME STEEN

I, Jerome Steen, do depose as follows:

1. I joined the New Jersey Department of Banking and Insurance ("Department") in 1956. In 1970, I was the primary general liability rate analyst for the Department and was involved in most of the complex general liability filings, including the pollution exclusions.

2. I was a general liability analyst in 1966 when "occurrence" coverage was introduced on a standard basis. I understood the difference between the terms "occurrence" and "accident." The earlier "accident" coverage related to a fortuitous event identifiable in time, an event which was both sudden/abrupt and unexpected. "Occurrence" expanded the basis of coverage to include claims for damages arising out of multiple or gradual events.

3. It is my understanding that, with regard to the 1970 pollution exclusion filings, there now exists opinions that the Department was either misled by the supporting justification provided by filers or that it misunderstood the significance of the subject filings. Neither consideration is, in fact, valid, as is indicated here and in Department documents in connection with these filings.

4. The initial such filings were made by INA/Pacific Employers in March of 1970, with subsequent filings made by the IRB and the MIRB. As all these filings were substantially similar in effect and supporting statements, the subsequent filings were bundled with the INA filing. The Department's disposition of the INA filing would form the guideline for evaluating any similar filings.

5. As the analyst first reviewing the filings, I had no particular problem or concern with the filers' assertion

that—from their standpoint—this was a clarification of coverage, in that the filers did not consider that pollution liability was covered or was not intended to be covered in most situations by the conventional general liability policy. I was aware of no information that would contradict that perception. Claims for environmental damage were not common at the time.

6. I also had no particular problem in discerning that—from a contractual standpoint—the filings introduced specific new exclusionary language that was sufficiently important to be evaluated not only in terms of contractual effect but, also, in terms of public policy considerations. Our thoughts ran along many lines, such as: should polluters be protected from the economic consequences of their intentional acts through insurance; should payment through insurance be available where the polluter cannot pay; should insurers pay, but have contractual recourse against the insured; should it be a basic coverage whose cost would be borne by all insureds?

7. In 1970, I understood "sudden" to mean "quick" in a temporal sense. I understand that, under certain circumstances, the "sudden" language of the exclusion would restrict coverage as well as clarify the insurance contract with respect to the insurance industry's perception in 1970 that most gradual pollution discharge claims were already precluded by "occurrence" language.

8. I reviewed the issues of the new exclusionary language and its public policy considerations with Charles Maier, Chief of the Rating Division, who sent the matter to the Commissioner's office for review by counsel and others on the Commissioner's staff.

9. Mr. Maier received commentary from Walter Davis, Jr., Director on the Commissioner's staff, that outlined various public policy considerations and laws then ex-

isting relating to environmental damage. It was clear that Mr. Davis had serious misgivings concerning the exclusion's approval.

10. There were subsequent discussions about the matter among persons in the Rating Divisions and the Commissioner's office, in part dealing with the question of whether potential pollution liability was a matter of "nuisance" (or minor) claims or something more significant. Ultimately, after all such considerations, Mr. Maier recommended approval of the subject exclusions with no immediate rate effect, and such action was then approved by Acting Commissioner Morgan Shumake.

11. Among the reasons for approving the exclusions were:

    (a) While there were differing views, based upon information then available there was no consensus pro or con as to the public policy concerns regarding the desirability of altering the policy to either clarify that certain coverage was provided or that coverage was not provided for most environmental damage. Both options were considered within the Department at that time. Had the Department been prescient enough to have foreknowledge of judicial decisions to come in future years, it is possible a somewhat different decision might have been made.

    (b) Based on the sparse data then available, it was the Department's understanding that claims for environmental damage were not common events and pertained to only a narrow class of insureds.

    (c) The generally accepted forms development concept is, in order to provide the broadest coverage to the greatest population of insureds at the least cost, that basic insurance coverage should be keyed to the common needs of the many and that the

special or extra ordinary needs of a limited class of insureds is better handled by supplemental specifically priced endorsements or by other insurance.

(d) As both the potential for coverage for nonfortuitous loss and the actual occurrence of loss appeared at that time to be quite limited, the application of the subject exclusions conformed to this forms coverage development concept. We believed this change would limit coverage to liability arising out of sudden fortuitous events, shifting the cost of general environmental damage coverage of those insureds that might have special need for such coverage to other specific insurance instruments.

12. As to the lack of an immediate rate adjustment to reflect the subject change, there was no meaningful loss data then available to formulate a retrospective rate adjustment for the general liability line. Nor was there a basis for apportioning any reduction among classes, based upon the relative effect of the change on differing classes.

13. In such circumstances, it was an accepted procedure to allow existing rates to prevail, based on the consideration that future experience would reflect whatever effect the subject provisions might have and, accordingly, rates would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected.

14. As my April 20, 1970 memorandum reflects, I was aware that, as a result of the proposed pollution exclusion, it was possible that the costs of excluded environmental damage could fall on the State or other governmental agency when a policyholder, not otherwise insured by other specific insurance instruments, was not a financial position to pay for such loss.

15. Whatever prospective twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.

/s/ Jerome Steen
Jerome Steen

Sworn to before me this 17th day of August, 1993

/s/ Anna May Melio
Notary Public

ANNA MAY MELIO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 18, 1997

AFFIDAVIT

I, C. Eugene Farnam, do depose as follows:

1. I was Insurance Commissioner in the State of Massachusetts from 1962 to 1972. I generally recall the "sudden and accidental" pollution exclusion filed by the insurance bureaus in approximately 1970. My recollection is refreshed by a recent reading of the exclusion's language and the Explanation submitted to state insurance regulators by the Insurance Rating Board.

2. It goes without saying that in 1970 I understood the policy term "sudden" as describing a temporal event. It meant "quick"/"abrupt." It could not include processes or happenings that occurred gradually or incrementally over time.

3. The IRB Explanation stated that coverage would still be provided for an "accident." In 1970 I understood an "accident" as an event which was identifiable in time and place. An "accident" was a "boom" event, like an explosion. The Explanation was perfectly consistent with the exclusion's language. In essence, pollution coverage was returned to a "caused by accident" basis in 1970.

4. The Explanation was also correct in stating in 1970 that "in most cases" pollution claims would not be covered under the occurrence definition, which precluded claims for damage that was expected or intended. It was understood in 1970 that there was generally no pollution coverage under the 1966 CGL occurrence policy. Pollution damage generated in the normal course of an insured's business operations would, or should, be expected. It was a cost of doing business and not an insurable risk.

5. In this context, the pollution exclusion certainly did clarify the coverage situation in 1970. The restriction inherent in the exclusion's language, and confirmed in the Explanation, was obvious. The exclusion was not, however,

considered as significantly reducing whatever pollution coverage existed in 1970.

6. The explanatory materials submitted in 1970 to the department were not misleading. Both the exclusion's plain language and the IRB Explanation said the same thing. There would be no coverage for ongoing or continuous pollution discharges, even if the discharges were unexpected. A claim would have to arise out of a pollution event that was both sudden and accidental.

7. The lack of a premium reduction when the exclusion was approved did not mean the exclusion's restrictive effect was not understood in my department. Pollution claims were quite rare in 1970. This was many years before the age of Superfund. There was no way to rate the exposure at that time. Premiums would have been adjusted prospectively as loss data was compiled.

/s/ C. Eugene Farnam
C. EUGENE FARNAM

/s/ William M. Leonard
NOTARY PUBLIC
Sworn to before me this
24th day of September 1993

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss September 24, 1993

Then personally appeared before me, the above named C. Eugene Farnam and declared to me that the material contained herein is the truth to the best of his memory.

William M. Leonard
William M. Leonard, Notary Public
My commission expires:
April 29, 1994

AFFIDAVIT

I, Elmer V. Omholt, depose as follows:

1. I was Insurance Commissioner in the State of Montana for over twenty-three years (1961-1985).

2. I do not specifically recall the Insurance Rating Board's filing of a "sudden and accidental" pollution exclusion in 1970. It was just one of many filings made. The topic it addressed was then not the big issue it is today. I have recently read that exclusion and the IRB Explanation which accompanied it. I can state without any hesitation that there was and is nothing misleading about the IRB Explanation. The language of the exclusion is also clear.

3. As the exclusion plainly states, a pollution event must be "sudden" as well as fortuitous to be covered. "Sudden" meant something quick or abrupt. It would certainly not include something that occurred gradually over time. The exclusion is precisely worded. Only a true pollution "accident" would be covered. That is exactly what the IRB Explanation confirmed. An "accident" was a "boom" event, like an explosion.

4. Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.

5. Therefore, while the restrictive language of the exclusion was obvious, that restriction was not viewed as very significant in the pre-Superfund era of 1970. Today's stringent pollution laws and regulations were not part of the perspective of those of us in the insurance field back then. The exclusion indeed clarified in 1970 the general lack of

pollution coverage available under the 1966 CGL occurrence policy.

6. It makes no sense for anyone to say that the lack of a premium reduction in 1970 meant that the exclusion lacked restrictive effect. You cannot reduce premiums (or increase them for that matter) without adequate data. As pollution loss data was yet unavailable, no reduction of premium would have been indicated in 1970.

7. My department took its obligation to protect insurance consumers very seriously. I emphatically reject the notion that there was anything remotely misleading about the IRB Explanation. The IRB Explanation was straightforward and accurate.

/s/ Elmer V. Omholt
ELMER V. OMHOLT

/s/ Sharon J. Etzuiler
NOTARY PUBLIC
Sworn to before me this
30 day of Sept. 1993.

AFFIDAVIT

I, HENRY L. LAUER, do depose as follows:

1. I joined the New York Insurance Department ("the Department") in 1957. In 1962 I became a Senior Insurance Examiner of the Rating Bureau. In 1981 I was promoted to Chief of the Property and Casualty Division. I continue in that capacity today. In 1970, in addition to other duties, I was responsible, along with others in our Rating Bureau, for approving general liability form filings for the Department. We processed form filings under the supervision of our superiors in the Rating Bureau.

2. In 1970 we had quite a large department of professional career insurance regulators. We were part of Zone 1, which included New Jersey, Maine and others. We examined filings of insurance carriers and their rating bureaus very carefully to make certain they complied with the provisions of Section 2307 of the Insurance Law. That law required that forms not be misleading nor be in violation of public policy. We frequently discussed filings with insurance regulators in other Zone 1 states.

3. During my career of over thirty-five years with the Department I have served under many Superintendents and Deputy Superintendents. They were generally not involved in the day-to-day operations of the approval process of filings. However, the degree of their involvement varied with the individual. During the time that he was Superintendent of the Department, Richard E. Stewart, to the best of my recollection, never participated in the decision making discussions which led to approval or rejection of form filings. In fact all such approvals were signed in his name, usually by one of the Insurance Examiners.

4. Throughout my career the meaning of certain words has been basic to liability insurance. When I joined the Department liability policies were written on a "caused by accident" basis. An "accident" was a "boom" event, one

which occurred quickly. It was a "sudden" happening in the temporal abrupt sense. "Sudden was always understood as the opposite of "gradual." "Sudden and accidental" was another way of describing an event which was an "accident." In 1966 the carriers' rating bureaus filed the "occurrence" general liability policy which temporally expanded standard coverage. It insured not only the sudden accident but also gradual damage. I know that these word usages were part of common, every-day speech, not only within the Department's Rating Bureau, but also among the general liability regulators of the other departments within Zone 1.

5. I recall the "sudden and accidental" pollution exclusion which the carriers' rating bureaus submitted for approval in 1970. I easily recognized that it excluded coverage for gradual pollution discharges by excepting coverage for the old "boom" pollution accident which it identified as "sudden and accidental." I observed that for non-pollution situations the policy continued to insure gradual damage on an "occurrence" basis.

6. The Explanation submitted with the exclusion confirmed that coverage for pollution damage was continued only for a pollution "accident." That was about the only real basis for pollution coverage under "occurrence" policies anyway. I was not surprised to see the Explanation state that "most cases" of pollution caused expected or intended damage. In those days virtually all pollution damage was caused by regular business pollution discharges, and pollution coverage claims were few. I agreed with the Explanation that this situation of general lack of "occurrence" pollution coverage was clarified by eliminating coverage for gradual pollution discharges. Obviously when you stop covering damage caused by gradual pollution discharges, you also stop coverage for the expected damage which, "in most cases," those gradual discharges are causing.

7. I understand that former Superintendent Stewart has testified to the effect that the carriers' rating bureaus did not communicate a temporal usage in this filing, and that regulators were told they were only dealing with a clarification of the "occurrence" definition which caused no change at all in coverage. He has apparently stated that a restrictive operation of the exclusion upon gradual pollution discharges in 1970 would have resulted in a drastic reduction of coverage. These conclusions are simply not true. It is hard for me to accept that he would advocate these positions.

8. The way the exclusion temporally restricted coverage was clearly communicated by the carriers' rating bureaus to regulators. There was no mystery at all in the language that was used. We in the Department, and particularly in the Rating Bureau, were not in the slightest bit misled by this filing. There is absolutely no basis in fact for former Superintendent Stewart to suggest, nor for anyone to conclude, that we were misled.

9. Although we did not view this exclusion as working a significant reduction in the limited amount of realistic pollution coverage then available under occurrence policies, we did clearly recognize that the exclusion would take away coverage for any gradual pollution discharges which were truly unexpected. At that time any such liability was very rare since today's vast array of Superfund liabilities did not exist. Nevertheless, because it was possible that some gradual but unexpected losses had accrued under existing liability policies we refused to permit the exclusion to be attached to existing policies as the carriers' rating bureaus had proposed. We granted our approval for its use only on new and renewal policies. Our approval on that basis clearly signals our perception of this filing as causing a reduction of coverage in some cases.

10. I recall that back around 1970 New York was an "file and use" state. The carriers' rating bureaus suggested

advisory rates, and competition in the marketplace would govern rates. Moreover, insurance departments would not have required premium reductions for exclusions, such as the pollution exclusion, where there was no indication of change in loss data.

11. We thought at the time that our approval of the exclusion for prospective application was in accord with Section 2307 of the Insurance Law. We felt the exclusion was not unfairly discriminatory nor in violation of public policy. We thought it would help contain the cost of insurance as well as discourage pollution activities. Our public policy perceptions were soon validated. In 1971 the State of New York enacted the "sudden and accidental" pollution exclusion into law. That made it illegal to insure damage caused by gradual pollution discharges.

12. I understand it has been suggested that the Legislature understood that this law would preclude coverage only for active (reckless and intentional) polluters. That was one object accomplished by the statute. However, I know and recall that we in the Department clearly recognized that the new law operated the same restrictive way as did the pollution exclusion the carriers' rating bureaus had previously submitted. Our Department drafted this bill which the Governor subsequently, and successfully, sponsored. It clarified that coverage for regular pollution damages would not be available because coverage for all gradual pollution discharges, even if unexpected, was prohibited. That clarification was accomplished by permitting coverage to be written only for temporally sudden pollution accidents it described as "sudden and accidental." Of course, the statute did not affect the legality of non-pollution insurance to continue to be written for gradual damages on an "occurrence" basis.

13. Because of the requirements of the "sudden and accidental" pollution statute it was necessary for a gradual pollution exclusion to be attached to the Farmers Com-

prehensive Personal Insurance Policy. The carriers' rating bureau submitted the standard form "sudden and accidental" pollution exclusion for compliance with the statute. I approved that filing on August 11, 1971 when I was Senior Insurance Examiner of the Rating Bureau.

/s/ Henry L. Lauer
HENRY L. LAUER

Subscribed and sworn to
before me, this 28 day
of October, 1993.

/s/ Elaine R. Berger
Notary Public

/s/ Elaine R. Berger
ELAINE R. BERGER
Notary Public, State of New York
No. 30-4700373
Qualified in Nassau County
Commission Expires January 31, 1994

AFFIDAVIT

I, John W. Lindsay, do depose as follows:

1. I was the South Carolina State Insurance Commissioner from March 1970 to 1972. I returned to the department, again as Insurance Commissioner, from 1975 to 1981. From 1955 to 1970, I actively observed regulatory matters that came before the National Association of Insurance Commissioners.

2. Going back to 1970, the filing of then-new pollution exclusions was not a matter of earthshaking consequence. Pollution coverage issues were essentially non-issues. This was so because, even under the 1966 CGL "occurrence" policy, there was generally no coverage intended or provided for pollution.

3. Contamination damage resulting from the routine and normal operations of an insured was not a covered occurrence. Damage resulting from repetitive business practices was a cost of doing business and not insurable. I have recently reviewed the "Explanation" submitted by the Insurance Rating Board to state insurance regulators in 1970. It quite appropriately stated that, since "in most cases" pollution claims were already precluded by the occurrence definition, the exclusion clarified the lack of existing pollution coverage at that time.

4. It should not be forgotten that 1970 was years before the era of Superfund. The many liabilities created by statutes like RCRA and CERCLA simply didn't exist. To impose a modern-day perspective on the perceptions of insurance bureaus and insurance regulators in 1970 is illogical. The pollution exclusion would not have been perceived as having the dramatic impact on coverage it may have in today's climate of environmental liabilities.

5. That is not to say that the exclusion was not understood as restricting coverage under certain circumstances. The focus of the occurrence definition was upon harm that was

neither expected nor intended. The language of the pollution exclusion focused on the pollution discharge, which had to be both "sudden and accidental."

6. In 1970, there would be no question that "sudden" contained a temporal element of quickness/abruptness. I cannot conceive how anyone could have understood that "sudden" in any way included a gradual process or ongoing event.

7. Consistent with the "sudden" language of the exclusion, the IRB "Explanation" forthrightly stated there would be continued pollution coverage for an "accident." In 1970, "accident" was recognized as describing a "boom" event, a catastrophic happening which was identifiable in time and place. Even though some courts may have seen fit to stretch the interpretation of the policy term "accident" to include gradual exposures prior to 1970, that would not have affected insurance bureaus' and insurance regulators' longstanding usage and understanding of that term. The pollution exclusion, then, returned pollution coverage back to a pre-1966 "caused by accident" basis.

8. Even though the obvious restriction the pollution exclusion carried was clearly understood, pollution claims were few in 1970. Thus, there would have been no basis to rate the exposure or request a reduction in premiums. Rates would be adjusted subsequently as loss data was compiled. This was a common practice in the insurance regulation field.

9. In South Carolina, we took our responsibility to protect the public very seriously. The merits of regulatory filings, especially exclusions that could reduce coverage, were seriously weighed. The pollution exclusion was a fair exclusion, and its approval in South Carolina in 1970 was appropriate.

10. There is absolutely no basis in fact for anyone to assert or conclude that insurance regulators in South Carolina

were misled by the explanatory materials submitted by the insurance bureaus in 1970. The representations made in them were accurate and honest in every respect.

/s/ John W. Lindsay
JOHN W. LINDSAY

Sworn and Subscribed to
before me this 5th day
of October, 1993.

/s/ Diane S. Biffington
Notary Public

MY COMMISSION EXPIRES 11-21-1996

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L-016044-90

Civil Action

UMC/STAMFORD, INC. UNIDYNAMICS CORP., et al.,
Plaintiffs,

v.

ALLIANZ UNDERWRITERS INSURANCE CO., et al.,
Defendants.

FILED
March 16, 1994
JULIO M. FUENTES
J.S.C.

ORDER REGARDING CERTAIN RULINGS OF FEB. 24, 1994

THESE MATTERS having been opened to the Court by attorneys for various insurance carrier defendants, in the presence of counsel for plaintiffs, Lowenstein, Sandler, Kohl, Fisher & Boylan, A Professional Corporation, and by attorneys for plaintiffs, in the presence of counsel for defendants, for various orders, and the Court having considered the briefs, affidavits and oral arguments of counsel and good cause appearing;

IT IS on this 16th day of March, 1994;

ORDERED that:

1. Plaintiffs' request to amend the complaint to add two additional policies to this matter be and is hereby DENIED.

2. Certain defendants' motions for summary judgment on the basis that there is no evidence of an occurrence during the policy periods be and are hereby DENIED.

3. Certain defendants' motions for summary judgment on the basis of the "pollution exclusion" clause be and are hereby DENIED.

4. The ruling of *Morton Int'l v. General Accident Ins. Co.*, 134 N.J. 1 (1993), shall be applied with regard to all issues regarding the "pollution exclusion" clause.

ORDERED that a copy of this Order shall be served upon all counsel of record within seven days of receipt.

/s/ Hon. Julio M. Fuentes
Hon. Julio M. Fuentes, J.S.C.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY, CIVIL PART

DOCKET NO. ESX-L-16044-90

UMC/STAMFORD, INC.,

Plaintiff,

vs.

ALLIANZ UNDERWRITERS INSURANCE COMPANY,

Defendant.

Place: Essex County Courthouse
M. L. King Blvd.
Newark, New Jersey 07102

Date: February 24, 1994

TRANSCRIPT OF MOTION

BEFORE:

HONORABLE JULIO FUENTES, J.S.C.

TRANSCRIPT ORDERED BY:

ARTHUR H. SAIEWITZ, ESQ., (Lowenstein, Sandler, Kohl, Fisher & Boylan, 65 Livingston Ave., Roseland, New Jersey 07068)

ATTORNEYS APPEARING:

MICHAEL DORE, ESQ., (Lowenstein, Sandler, et al.)
ARTHUR SAIEWITZ, ESQ. (Lowenstein, Sandler, et al.)

MARION HURTZ, ESQ., (Sheft & Sheft), for Republic
NINA LYNN CAROSELLI, ESQ., (Morgan, Melhuish, et al.) for Home

TIMOTHY SAEF, ESQ., (Morgan, Melhuish, et al.) for Home
ELIZABETH DE CRISTOFARA, ESQ. for Continental
SUSAN BERNARD, ESQ. for Continental
JUSTIN KEAN, ESQ. for Continental
MARYANN DAMATO, ESQ., (Mendes & Mount) for London Market
BRUCE A. TRITSCH, ESQ., (Feinberg & Tritsch) for Allstate
VINCENT SICALLELLA, ESQ., (Gleason, McGuire, et al.)-Allstate
ROBERT WALSH, ESQ., (Siff Rosen) for Hartford, et al.
LEONARD SEAMAN, ESQ., (Garity, Brown, et al.) for Utica
JEFFREY WALDER, ESQ., (Walder, Sondak, et al.) for Ultra

* * * *

THE COURT: Okay. Thank you all. We have to move on, I've got 4:00 o'clock and if I'm going to decide this I have to do it now because otherwise we have to come back another day.

After considering the papers submitted and the respective oral arguments and the legal authorities that I've reviewed, it is my determination that the pollution exclusion clause in the various policies subject to this lawsuit will be construed in accordance with the decision in the New Jersey Supreme Court case of *Morton vs. General Accident* which is cited at 134 NJ 1.

Certainly, summary judgment should be granted with caution. Caution is especially warranted where the issue involves important public policy considerations. And the record is a meager record. In *Morton* the Supreme Court of New Jersey stated, and I quote:

"We construe and give effect to the standard pollution exclusion clause only to the extent that shall preclude coverage for pollution caused—property damage caused by an

occurrence if the insured intentionally discharged, disbursed, released or caused the escape of a known pollutant". This is *Morton* at page 31.

The Supreme Court so limited the pollution exclusion clause in insurance policies because it found that the insurance industry had grossly mislead New Jersey regulatory agencies and regulatory agencies in other states. The New Jersey Supreme Court concluded that to enforce the standard pollution exclusion clause, as written, would contravene the state's public policy requiring regulatory approval of standard industry wide policy forums to assure fairness in rates and in policy content and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause.

I'm citing *Morton* at page 30:

"New Jersey will not apply the law of other states if it will conflict with important public policies in New Jersey".

Here the plaintiff is doing business in New Jersey, seeks recovery with respect to the matter covered by this motion for liability imposed upon it and its subsidiaries. The insurance carriers attempt to avoid coverage by relying upon a clause in the policy which the New Jersey Supreme Court has said resulted from deliberate misleading and wrongful conduct by the insurance industry.

The Supreme Court characterizes that conduct as not only deliberately misleading, but coming perilously close to deception.

In view of the strong language in the Supreme Court opinion in *Morton* concerning the improper conduct of insurance industries, it is not conceivable to me that the New Jersey Supreme Court would construe the meaning of the pollution exclusion clause in this case in such a way as to permit the carriers to avoid coverage. Any other

interpretation would be seriously in conflict with important public policy of New Jersey as stated in Morton.

Under those circumstances, the pollution exclusion clause, no matter where the site, must, in the New Jersey action, especially where the plaintiff does business in New Jersey, be construed and applied in accordance with the decision of the Supreme Court in *Morton*.

In other words, the insurance companies here in this case, as in *Morton*, are estopped as a matter of equity and fairness from relying on the literal language of the pollution exclusion clause.

Accordingly, my decision is to deny all motions seeking dismissal of plaintiffs cause of action based on the pollution exclusion clause.

There are other issues related to that same clause concerning a sudden event and a happening and so forth, and these are issues that must be decided in the context of factual presentations and may be raised again at the conclusion of plaintiffs case.

That's my decision with regard to this issue. I have some other issues and we do have to stop, that must be addressed, justiciability, choice of law, I've heard a considerable amount of argument. I think many of you have included those arguments on the pollution exclusion issue. Owned property, late disclosure of settlement and there's also a motion, I think it's by Home Insurance and Continental, to be dismissed as to certain sites.

* * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO: W-56581-88

Civil Action

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Plaintiff,

-against-

AETNA CASUALTY AND SURETY COMPANY, et al.,
Defendants.

FILED
DEC 09 1993
BURRELL IVES HUMPHREYS
A.J.S.C.

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR DETERMINATION OF APPLICABLE LAW

This matter having been brought before the Court by the motions and cross-motions for summary judgment by defendants Aetna Casualty & Surety Co., Plaisted and Companies, United States Fire Insurance Co., The North River Insurance Co., International Insurance Co., Home Insurance Co. and City Insurance Co., and by the cross-motion of plaintiff American Telephone & Telegraph Company ("AT&T") for a determination of applicable law, and the Court having considered the written submissions of all parties, and having heard oral argument by counsel, and

for the reasons set forth in this Court's Oral Opinion on November 19, 1993;

IT IS on this 8 day of Dec., 1993

ORDERED, that the motions and cross-motions for summary judgment by defendants Aetna Casualty & Surety Co., Plaisted and Companies, United States Fire Insurance Co., The North River Insurance Co., International Insurance Co., Home Insurance Co., and City Insurance Co. be and hereby are denied; and it is further

ORDERED, that plaintiff AT&T's cross-motion for a determination of applicable law be and hereby is granted, to the effect that the "pollution exclusion" clauses contained in the various policies of insurance at issue in this case shall be interpreted in accordance with the New Jersey Supreme Court's Opinion in *Morton International, Inc. v. General Accident Insurance Company of America*, 134 N.J. 1 (1993), as more fully described in this Court's Oral Opinion on November 13, 1993; and it is further

ORDERED, that a copy of the within Order shall be served upon all counsel of record within 3 days.

/s/ Hon. Burrell Ives Humphreys
Hon. Burrell Ives Humphreys, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, ESSEX COUNTY

DOCKET NO. W-56581-88

AMERICAN TELEPHONE and TELEGRAPH COMPANY,
Plaintiff,

vs.

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

Place: Essex County Courthouse
Newark, New Jersey 07102

Date: November 19, 1993

TRANSCRIPT OF MOTION

BEFORE:

HON. BURRELL IVES HUMPHREYS, J.S.C.

TRANSCRIPT ORDERED BY:

MR. JOHN S. HARVEY (Crummy, DelDeo, Dolan, Griffinger & Vecchione)

APPEARANCES:

MICHAEL D. LOPRETE, ESQ. (Crummy, DelDso, Dolan, Griffinger & Vecchione)
SETH D. SCHAFFLER, ESQ.
Attorneys for Plaintiff

ALAN WHITE, ESQ. (Harwood Lloyd)
BILL ELLISON, ESQ. (Loco, Bissell & Brook)

WILLIAM B. MC GUIRE, ESQ. (Tompkins, McGuire & Wachenfeld)
JOSEPH DE DONATO, ESQ. (Morgan, Melbuish, Monaghan)
LAURENCE MC HEFFREY, ESQ.
Attorneys for Defendants

* * * *

THE COURT: All right. Anything further? The Court's decision is as follows. This is a suit for a declaratory judgment and breach of contract by plaintiff against its insurance companies for liabilities plaintiff is incurring, or has incurred, in connection with various environmental claims. Approximately 24 waste disposal sites throughout the United States are involved. The defendants have counter-claimed, asserting that coverage is not available under their insurance policies.

Defendant Aetna moves for summary judgment with respect to one site, the Halleva land fill, located in Pennsylvania. Aetna contends that Western Electric, a subsidiary of plaintiff, shipped hazardous waste for disposal at this land fill from two generating facilities, also located in Pennsylvania. Other defendants join in the motion.

Aetna contends that Pennsylvania law should govern the construction of the pollution exclusion clause with respect to the Pennsylvania Halleva site. Aetna also contends there is no coverage because the contamination predated the Aetna policies and that the action should be dismissed as untimely as against Aetna because it is unlikely, according to Aetna, that plaintiff's liability will be large enough to be covered by Aetna, which is an excess insurance carrier.

Plaintiff cross-moves for a ruling that the pollution exclusion clauses of the insurance policies in this case are to be construed in accordance with the recent decision of the New Jersey Supreme Court in *Morton* vs. *General Accident*, 134 NJ 1, Supreme Court of New Jersey 1993.

After due consideration of the papers submitted, oral argument and the legal authorities, the Court denies the defendant's motion for summary judgment. The pollution exclusion clause will be construed in accordance with the decision of the New Jersey Supreme Court in *Morton*, supra. The Court's reasons are as follows.

I.

Summary judgment is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits and the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly show not to present any genuine issue of material fact requiring disposition at a trial. See *Judson* vs. *Peoples Bank and Trust Company of Westfield,* 17 NJ 67, 74 Supreme Court of New Jersey 1954. Summary judgment should be granted with caution. Caution is especially warranted where the issue involves important public policy considerations and the record is meager. See *Jackson* vs. *Muhlenberg Hospital,* 53 NJ 138, Supreme Court of New Jersey 1969, *Devlin* vs. *Burgint* (phonetic), 18 NJ 148, 154, Supreme Court of New Jersey 1955.

A movant for summary judgment was exclude [sic] any reasonable doubt as to the existence of any genuine issue of material fact. See *Judson* at page 74. All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated. Ibid.

Issues of credibility are ordinarily for the trier of fact, a Court should not function as a trier of fact in determining a motion for summary judgment. *Judson* at page 75.

Where subjective factors, such as fraud, intent or bad faith are material, then a conclusion from the papers alone that palpably there exists no genuine issue of fact will ordinarily be very difficult to sustain. *Judson* at 76.

II.

Under this Court's prior ruling, the law of Pennsylvania would be applied to construction of insurance policies re-

garding the Pennsylvania site. See this Court's opinion, July 2nd, and the Court's order of August 9th. Aetna argues that under Pennsylvania law, the pollution exclusion clause will exclude coverage under the facts of this case.

Subsequent to this Court's decision, the Supreme Court of New Jersey decided the *Morton* case and held, quote, accordingly, we construe and give effect so the standard pollution exclusion clause only to the extent that shall preclude coverage for pollution caused property damage caused by an occurrence if the insured intentionally discharged, dispersed, released or caused the escape of a known pollutant. *Morton* at page 31. The Supreme Court so limited the pollution exclusion clause in insurance policies because it found that the insurance industry had grossly misled New Jersey regulatory agencies and regulatory agencies in other states. The New Jersey Supreme Court concluded that to enforce the standard pollution exclusion clause, as written, "would contravene this State's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and policy content and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause." *Morton* at 30.

New Jersey will not apply the law of other states if it conflicts with important public policies in New Jersey. Here, plaintiff is a New Jersey domiciliary seeking recovery, with respect to the matter covered by this motion, for liability imposed upon its subsidiary. The insurance carriers attempt to avoid coverage by relying upon a clause in the policy which the New Jersey Supreme Court has said resulted from deliberate misleading and wrongful conduct by the insurance industry. The Supreme Court characterized that conduct as not only deliberately misleading, but coming "perilously close to deception."

In view of the strong language in the Supreme Court opinion in *Morton* concerning the improper conduct of the insurance industries, it would be in congress, indeed inconceivable, to conclude that the New Jersey Supreme Court would construe the meaning of the pollution exclusion clause in this case in such a way as to permit the carrier to avoid coverage. Put another way, construction of the clause in the manner sought by Aetna, assuming, for the sake of argument, that Pennsylvania would so construe it, would be seriously in conflict with important public policy in New Jersey. Under those circumstances, the pollution exclusion clause, no matter where the site, must in a New Jersey action, especially where the plaintiff is a New Jersey company, domiciliary, be construed and applied in accordance with the decision of the Supreme Court in *Morton.* Put yet another way, the insurance companies here, as in *Morton,* are estopped as a matter of equity and fairness from relying on the literal language of the pollution exclusion clause. See page 75 of *Morton* holding that estoppel would apply.

Aetna also contends that the facts here show that with respect to the Halleva's Pennsylvania site, the insured did intentionally dispose of hazardous products and, therefore, even under *Morton,* coverage is barred. Plaintiff disagrees. Both sides have filed voluminous papers supporting their view of the facts. This issue is particularly fact sensitive. In remediation cases, the insured's responsibility "vary significantly in their degree of culpability for harm caused by pollutant discharges." *Morton* at page 86. Consequently, the Court said in *Morton,* an intent to injure is not presumed simply by the knowing discharge of pollutants. What is required, the *Morton* said, is a "case by case analysis" in order to determine in the context of all the available evidence whether exceptional circumstances exist and objectively establish the insured's intent to injure. Those circumstances would include, the Court in *Morton* said, the duration of the discharges, whether the discharges oc-

curred intentionally, negligently, innocently, the quality of the insured's knowledge, harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm. See *Morton* at pages 86 and 87. Determination of such broad and general fact questions can best be determined in the conduct—in the context of a trial, not on a motion for summary judgment. Defendants may have presented a strong case with respect to the Halleva site, but that, standing alone, does not mean a motion for summary judgment should be granted. See *Rivola* (phonetic) vs. *American Casualty Co.*, 39 NJ 490, page 501, Supreme Court of New Jersey 1963.

That is withdrawn without prejudice, its known risk ground, to the extent not withdrawn by other movants, this is also a fact sensitive issues and fact issues are clearly present.

Plaintiff contends that its liability may reach Aetna's—may not—plaintiff contends that its liability may reach Aetna's excess coverage. Under those circumstances, a justiciable controversy exists and a declaratory judgment is proper. See NJSA 2A:16-52 and *T&E Industries* vs. *Safety Light Corp.*, 123 NJ 371, 397, Supreme Court of New Jersey 1991.

For the foregoing reasons, the Court rules as aforesaid. Counsel for the plaintiff, please submit a form of order?

* * * *

APPENDIX G

PETITIONERS' RULE 29.1 STATEMENTS

1. **Insurance Company of North America**

Parent Companies:

Applicant Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation, which is, in turn, a wholly-owned subsidiary of CIGNA Holdings, Inc. a wholly-owned subsidiary of CIGNA Corporation, the ultimate parent.

Subsidiaries (except for wholly-owned):

Applicant Insurance Company of North America has beneficial ownership of less than 100% in CIGNA Insurance Company of Canada.

2. **American Home Assurance Company**

Parent Companies:

Applicant American Home Assurance Company is a wholly-owned subsidiary of American International Group, Inc.

Subsidiaries (except for wholly-owned):

Applicant American Home Assurance Company has two subsidiaries that are not wholly-owned: AIG Realty and Transatlantic Holdings, Inc.

3. **Continental Casualty Company**

Parent Companies:

Applicant Continental Casualty Company is a wholly-owned subsidiary of CNA Financial Corporation, which is, in turn, a wholly-owned subsidiary of Loews Corporation, the ultimate parent.

Subsidiaries (except for wholly-owned):

Applicant Continental Casualty Company has two subsidiaries that are not wholly-owned: Agency Management Services, Inc. and CNA Income Shares, Inc.

4. **First State Insurance Company**

Parent Companies:

Applicant First State Insurance Company is a wholly-owned subsidiary of ITT Corporation.

Subsidiaries (except for wholly-owned):

None.

5. **General Accident Insurance Company of America**

Parent Companies:

Applicant General Accident Insurance Company of America is a wholly-owned subsidiary of General Accident Insurance Corporation of America, which is a wholly-owned subsidiary of Scottish Insurance Corporation, which is, in turn, a wholly-owned subsidiary of General Accident Fire & Light Assurance Corporation, PLC, which is a wholly-owned subsidiary of General Accident, PLC, the ultimate parent.

Subsidiaries (except for wholly-owned):

Applicant General Accident Insurance Company of America has beneficial ownership of less than 100% in Pilot Insurance Company and Hawkeye Security Insurance Company.

6. **Liberty Mutual Insurance Company**

Parent Companies:

None.

Subsidiaries (except for wholly-owned):

Applicant Liberty Mutual Insurance Company has 15 non-wholly-owned subsidiaries:

(1) Galaher Settlements & Insurance Services Company, Inc.
(2) Liberty Mutual (Bermuda) Ltd.
(3) The Stuart Insurance Group Ltd.

(4) St. James Court Ltd.
(5) Premier Treatment & Health Management Centre, Inc.
(6) Liberty Mutual Insurance Company (U.K.) Ltd.
(7) Helmsman Underwriting Ltd.
(8) Liberty Northwest Insurance Corporation
(9) Helmsman Management Services Northwest, Inc.
(10) Liberty Health Plan, Inc.
(11) Liberty Mutual Property-Casualty Holding Corporation
(12) Liberty Insurance Corporation
(13) Liberty Life Assurance Company of Boston
(14) Helmsman Management Services, Inc.
(15) Helmsman Insurance Agency, Inc.

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

(3)

No. 93-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

vs.

MORTON INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. WACHENFELD
Counsel of Record
JOHN G. MCANDREWS
HENRY LEE
GARY P. SCHULZ
MENDES & MOUNT
750 Seventh Avenue
New York, New York 10019
(212) 261-8000

Attorneys for Respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies, and Affiliated FM Insurance Company

10 pp

QUESTION PRESENTED

Is the Due Process Clause of the Fourteenth Amendment violated when a state supreme court *sua sponte* invokes a doctrine of regulatory equitable estoppel to impose retroactive liabilities without providing notice of consideration of such a claim or allowing an evidentiary hearing on any disputed genuine and material issue of fact?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of New Jersey were Morton International, Inc. (as plaintiff-appellant); General Accident Insurance Company of America, Affiliated FM Insurance Company, Continental Casualty Company, and First State Insurance Company (as defendants-respondents); and Liberty Mutual Insurance Company, American Home Assurance Company, Insurance Company of North America, Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies (as defendants-respondents and cross-appellants).

Respondents supporting the petitioners pursuant to Rule 12.4 are Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company. The Rule 29.1 list of parent companies and subsidiaries (other than wholly-owned subsidiaries) is produced at Appendix 13a.

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APPENDIX A

Chemical Leaman Tank Lines Brief to the U.S. Court of Appeals for the Third Circuit filed May 17, 1994 (excerpts) 1a

APPENDIX B

Respondents' Rule 29.1 Statements 13a

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, U.S. Constitution, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The Supreme Court of the State of New Jersey in its opinion below determined that insurance companies were estopped from asserting the clear meaning of a policy exclusion. The estoppel claim was not raised by the policyholder, Morton, or by the many amici who supported Morton at any stage of the litigation before the New Jersey Supreme Court issued its opinion. The "evidence" relied upon by the Court was first accepted into the record of the case on the day the Court issued its opinion. The "evidence" was first submitted by amici, over the objections of petitioners and these respondents, while the matter was pending before the Supreme Court. The insurers challenged both the propriety of the Court's reliance on the submission and the accuracy and completeness of the submission, and requested a plenary hearing of these issues.

The New Jersey Supreme Court ruled against the insurance companies on a claim that had never been made before the decision, without affording any proper opportunity to challenge the purported facts on which the Court relied. This ruling is a clear violation of the fundamental due process requirements of notice of a claim and opportunity for proper hearing of the defense to the claim.

REASONS FOR GRANTING THE WRIT

The Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies (hereafter London Market Insurers) who are parties to this litigation are subscribers to policies of insurance naming Velsicol Chemical as the named

insured and Woodridge as an additional insured. London Market Insurers were sued by Morton in its capacity as successor in interest to Woodridge. All London policies at issue before the New Jersey Supreme Court expired before 1970, the relevant date for the regulatory submissions.

Although several of the policies at issue subscribed to by London Market Insurers contain pollution exclusions, the exclusions were not of the form discussed by the New Jersey Supreme Court in its opinion regarding estoppel.

London Market Insurers were not members of the IRB, and were not admitted insurers in the State of New Jersey. London Market Insurers did not participate in the IRB filings with the New Jersey Department of Insurance. London Market Insurers made no later filings regarding the IRB form pollution exclusion with the New Jersey Department of Insurance.

A committee of the Lloyd's Non-Marine Association drafted a form pollution exclusion with conditional exceptions in 1961, form NMA 1333. In 1969, the committee drafted pollution exclusion forms NMA 1683 and 1685. These forms were often used by Lloyd's Underwriters and by London Market Companies. After the IRB form pollution exclusion was produced, however, some policyholders requested that the IRB form pollution exclusion be part of the London policies instead of the NMA form. On some occasions, London Market Insurers acceded to the request.

In certain of those instances, policyholders are now asserting that London Market Insurers are also bound by the New Jersey Supreme Court opinion on estoppel in *Morton*. We refer the court, as an example, to the brief of Chemical Leaman Tank Lines to the United States Court of Appeals for the Third Circuit (Appendix at 1a).

At an elementary level, it should appear that in order for a claim of regulatory estoppel to be made against a party, that party must have had some communication with the regulators on the matter for which estoppel is sought. This point, however, appears to have eluded some litigants in New Jersey, and there is at least the risk it may elude some judges.

London Market Insurers accordingly have an interest in having this Court address the issues raised by the petitioners.

Affiliated FM Insurance Company also supports the pending Petition. Similar to the position of London Market Insurers, Affiliated FM Insurance Company was not a member of the IRB and did not participate in the IRB filings with the New Jersey Department of Insurance, although it did utilize the form of pollution exclusion discussed by the New Jersey Supreme Court in the opinion at issue.

Accordingly, Affiliated FM Insurance Company, like the London Market Insurers, had no communication, directly or through any representative, with the regulators on the matter for which estoppel is sought. For this reason, Affiliated FM Insurance Company did not join in the Petition but, nonetheless, supports same and joins in the comments of the London Market Insurers.

London Market Insurers do not wish to burden this court with unnecessary repetition of points and authorities raised in the petition. We would only emphasize that the opinion of the New Jersey Supreme Court strikes at core concepts of justice in the Western World, concepts embodied in the U.S. in, among other mandates, the due process clause of the Fourteenth Amendment.

The New Jersey Supreme Court's opinion can clearly be seen as a breach of due process when one considers:

1. The theory on which coverage was found, regulatory estoppel, was never argued by either the policyholder or the multitude of *amici*.

2. There was no discovery permitted and no cross-examination opportunity afforded regarding the purported Department of Insurance file as respects whether it was genuine and complete.[1] The purported file was first proffered by *amici* before the

---

[1] London Market Insurers objected to the submission of what later proved to be only parts of the Department file when it was proffered to the New Jersey Supreme Court to demonstrate ambiguity. *See* Petitioners' Appendix at 207a-209a. Subsequently, there were several submissions of other parts of the purported file by *amici* for Morton.

New Jersey Supreme Court. The Court's reliance on the purported file constitutes a *de novo* finding of fact without a hearing. Further exacerbation derives from the formal acceptance of the file into the record by the Court on the same day it issued its opinion.

3. The Court accepted as "evidence" publications consisting of unfettered advocacy by attorneys pressing the policyholders' point of view. *See especially* Petitioners' Appendix at 51a-52a, Opinion of the New Jersey Supreme Court, quoting and relying upon Robert Sayler of Covington & Burling, also counsel for *amici* for Morton.

Fundamental fairness, embodied in and by the Fourteenth Amendment, requires notice of the claim against a party, and an opportunity for a hearing to present a defense of that claim. Here, these requirements were in essence abrogated by the New Jersey Supreme Court, in the name of judicial notice and judicial economy. *See, e.g.*, Petitioners' Appendix at 35a, Opinion of the New Jersey Supreme Court.

London Market Insurers do not suggest that this Court enter the thicket of state law contract interpretation issues, e.g. on the meaning of "sudden." Nor do we suggest that this Court determine whether a claim for regulatory estoppel can exist nor what the elements of such a claim must be. We do suggest that the Court mandate that the State Courts dealing with such issues must comply with federal constitutional guarantees of adequate notice of a claim, and a proper opportunity to defend the claim.

CONCLUSION

London Market Insurers respectfully suggest that judicial economy cannot override due process, and that this Court should remand this matter to the New Jersey Supreme Court with instructions to strike those portions of the opinion regarding estoppel.

Dated: May 27, 1994

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

vs.

MORTON INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

APPENDIX TO BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5777, 93-5794

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant,

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLEE CHEMICAL LEAMAN TANK LINES, INC.

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May 17, 1994

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Chemical Leaman Tank Lines, Inc. makes the following disclosure:

1. Said party is not a subsidiary or affiliate of a publicly owned corporation.

2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

May 17, 1994

/s/Kevin B. Clark

Kevin B. Clark

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In *Morton*, the New Jersey Supreme Court also held that the standard pollution exclusion only precludes coverage when the insured "intentionally discharges a known pollutant." *Id.* at 78, 629 A.2d at 875. In reaching this conclusion, the Supreme Court found that the term "sudden" included a temporal element, but refused to apply the literal meaning of the pollution exclusion because: (1) the insurance industry had grossly misrepresented its meaning and significance to state insurance regulators, and therefore was barred from asserting a more restrictive meaning under the doctrine of regulatory estoppel; and (2) the insurance industry had unfairly profited from those misrepresentations by failing to reduce premiums to a lower level that would "undoubtedly" have been required if full disclosure had been made. *See* 134 N.J. at 75-78, 629 A.2d at 874-75 (applying regulatory estoppel); *id.* at 72-73, 629 A.2d at 872 ("the conclusion is inescapable that a significant rate reduction would have been required," if full disclosure had been made). Thus, while the reasoning of the trial court and the *Morton* Court diverged somewhat, they reached the same conclusions regarding the core meaning and application of the pollution exclusion.

A. Aetna And LMI Are Bound By *Morton's* Interpretation Of The Pollution Exclusion.

The *Morton* decision unambiguously held that the standard pollution exclusion that was presented to the New Jersey Department of Insurance by the Insurance Rating Board ("IRB") must be restrictively construed to exclude coverage only for "intentional discharges of known pollutants." The Court determined that, in light of its ruling on other issues, it did not need to decide whether its estoppel holding would similarly restrict the interpretation of "non-standard" pollution exclusions. *Id.* at 28, 629 A.2d at 847.

It is undisputed that Aetna's policies contained the standard IRB pollution exclusion and are thus subject to the Supreme Court's ruling. LMI, however, urge that they are exempt from

this holding and, thus, should benefit from *Morton*'s temporal reading of "sudden" because, they claim, most of their policies contained non-standard pollution exclusions, and because they assert that they were not a party to misrepresentations made to the New Jersey's insurance regulators. These arguments should be rejected.

1. LMI's Pollution Exclusions Are Legally Indistinguishable From The Standard IRB Exclusion.

First, as LMI concede, their policies in effect from April 1, 1974 through April 1, 1977 contained the "standard" IRB "sudden and accidental" pollution exclusion language that was at issue in *Morton*. LMI Br. at 24. The *Morton* court held that every policy containing that clause is bound by its regulatory estoppel holding, without regard to the identity of the insurer. 134 N.J. at 78, 629 A.2d at 875. As such, it is indisputable that the 1974-77 LMI policies are bound by the *Morton* decision.

The LMI policies from 1971-74 and 1977-81 contained a standard form pollution exclusion (designated "NMA 1685") that the trial court found – and LMI has conceded – is legally synonymous with the "sudden and accidental" language in the standard IRB pollution exclusion. JA8670, 8702, 8708 (SJ opin.); *Potomac Elec. Power Co. v. California Union Ins. Co.*, 777 F. Supp. 968, 978 n.23 (D.D.C. 1991) (LMI, represented by Mendes & Mount, admitted that there is no material difference between "sudden and accidental" in the IRB exclusion and "sudden, unintended and unexpected happening" in the NMA 1685 exclusion); *accord Olin Corp. v. Insurance Co. of N. Am.*, 762 F. Supp. 548, 563 (S.D.N.Y. 1991), (court found "no meaningful difference" between wording of IRB standard pollution exclusion and those containing the "sudden, unintended and unexpected" language), *aff'd*, 966 F.2d 718 (2d Cir. 1992). Thus, all of LMI's pollution exclusions in this case – unlike those involved in

APPENDIX B

RESPONDENTS' RULE 29.1 STATEMENTS

1. ***Dominion Insurance Company Limited***
Parent Companies:

The immediate holding company of Dominion Insurance Company Limited is Dominion Insurance Holdings Limited and its ultimate holding company is Fondiaria, SpA.

Subsidiaries (except for wholly-owned):

None.

2. ***British Merchants Insurance Company Limited***
Parent Companies:

British Merchants Insurance Company merged into Dominion Insurance Company Limited. Its immediate holding company is Dominion Insurance Holdings Limited and its ultimate holding company is Fondiaria, SpA.

Subsidiaries (except for wholly-owned):

None.

3. ***London & Edinburgh Insurance Company Limited***
Parent Companies:

London & Edinburgh Insurance Company Limited is a wholly-owned subsidiary of London & Edinburgh Insurance Group Limited which is, in turn, owned by Hartford International Insurance Company which is, in turn, owned by ITT Corporation.

Subsidiaries (except for wholly-owned):

London & Edinburgh Insurance Company Limited has one subsidiary that is not wholly-owned: Excess Underwriting Management Singapore Limited, which is in liquidation.

4. ***World Marine & General Insurance Company Limited***
Parent Companies:

World Marine & General Insurance Company Limited is wholly-owned by the Broken Hill Proprietary Company Limited.

Subsidiaries (except for wholly-owned):

None.

5. ***Royal Scottish Insurance Company Limited***
Parent Company:

Royal Scottish Insurance Company Limited, now known as Royal Scottish Assurance Company, is wholly-owned by the Royal Bank of Scotland Group plc.

Subsidiaries (except for wholly-owned):

Royal Scottish Assurance Company has one subsidiary that is not wholly-owned: Royal Scottish Assurance Services Limited.

6. ***Trent Insurance Company Limited***
Parent Companies:

Trent Insurance Company Limited was merged into Eagle Star Insurance Company Limited. Its holding company is Eagle Star Holdings plc and its immediate holding company is B.A.T. Financial Services Limited. The ultimate holding company is B.A.T. Industries plc.

Subsidiaries (except for wholly-owned):

None.

7. ***River Thames Insurance Company Limited***
Parent Companies:

The immediate holding company of River Thames Insurance Company Limited is Transamerica Insurance Company which owns 51% of the company. The ultimate holding company is Transamerica Corporation. The remaining 49% is owned by Sedgwick Group plc.

Subsidiaries (except for wholly-owned):

None.

8. ***English & American Insurance Company Limited***
Parent Companies:

English & American Insurance Company Limited is in provisional liquidation. All litigation regarding this company has been stayed pursuant to order of the United States Bankruptcy Court for the Southern District of New York. The ultimate holding company is English & American Group plc. No appearance is entered for this company and it should be deemed a party not interested in the petition.

Subsidiaries (except for wholly-owned):

English & American has the following four subsidiaries which are not wholly-owned:
(1) Eastgate Investments Limited
(2) Oberon Underwriters Limited
(3) Tower House Investments Limited
(4) Transglobe Underwriting Management

9. ***World Auxiliary Insurance Corporation Limited***
Parent Companies:

World Auxiliary Insurance Corporation Limited is a wholly-owned subsidiary of Commercial Union Assurance Company plc which is, in turn, a wholly-owned subsidiary of Commercial Union plc.

Subsidiaries (except for wholly-owned):

None.

10. ***Andrew Weir Insurance Company Limited***
Parent Companies:

Andrew Weir Insurance Company Limited is in provisional liquidation. All litigation regarding this company has been stayed pursuant to order of the United States Bankruptcy Court for the Southern District of New York. No appearance is entered for this company and it should be deemed a party not interested in the petition.

Subsidiaries (except for wholly-owned):

None.

11. ***Orion Insurance Company Limited***
Parent Companies:

Orion Insurance Company Limited is now known as Orion Insurance Company plc. It is a wholly-owned subsidiary of Nationale-Nederlandan NV which is, in turn, a wholly-owned subsidiary of Internationale Nederlanden Verzekeringen NV.

Subsidiaries (except for wholly-owned):

Orion Insurance Company plc has one subsidiary which is not wholly-owned: Orion Marine Insurance Underwriting Agency Limited.

12. ***Drake Insurance Company Limited***
Parent Companies:

Drake Insurance Company Limited was merged into Sphere Drake Insurance plc. Its immediate holding company is Sphere Drake Insurance Group plc which is, in turn, wholly-owned by Sphere Drake Acquisitions Limited which is, in turn, wholly-owned by Sphere Drake Holding plc (U.K.), which is, in turn, wholly-owned by Sphere Drake Limited which is, in turn, wholly-owned by SD Holding Limited which is, in turn, wholly-owned by Sphere Drake Holdings Limited (Bermuda).

Subsidiaries (except for wholly-owned):

None.

13. *Sphere Insurance Company Limited*
Parent Companies:

Sphere Insurance Company Limited is now known as Sphere Drake Insurance plc. Its immediate holding company is Sphere Drake Insurance Group plc which is, in turn, wholly-owned by Sphere Drake Acquisitions Limited which is, in turn, wholly-owned by Sphere Drake Holding plc (U.K.), which is, in turn, wholly-owned by Sphere Drake Limited which is, in turn, wholly-owned by SD Holding Limited which is, in turn, is wholly-owned by Sphere Drake Holdings Limited (Bermuda).

Subsidiaries (except for wholly-owned):

None.

14. *Minster Reinsurance Company Limited*
Parent Companies:

Minster Reinsurance Company Limited is now known as GAN Minster Insurance Company Limited which is a wholly-owned subsidiary of GAN International SA. The ultimate holding company is Société Centrale du Groupe des Assurances Nationales.

Subsidiaries (except for wholly-owned):

GAN Minster Insurance Company has thirteen subsidiaries which are not wholly-owned:

(1) Progress Insurance Company Ltd.
(2) Progress Assurance SA.
(3) Arthur Street Investments Ltd.
(4) Arthur Street Management Ltd.
(5) Hobbs Savill Ltd.
(6) Minster Assets Ltd.
(7) Minster Development Co. Ltd.
(8) Minster Discount & Guarantee Co. Ltd.
(9) Minster Estate & Property Co. Ltd.
(10) Minsure Nominees Ltd.
(11) Robert Bradford & Co. Ltd.
(12) Robert Bradford Ltd.
(13) Touchline Service Ltd.

15. ***British National Life Insurance Society Limited***
Parent Companies:

British National Life Insurance Society Limited is now known as British National Life Assurance Company Limited. Its immediate holding company is CI Services Holdings Limited, and its ultimate holding company is Wingfield Limited.

Subsidiaries (except for wholly-owned):

None.

16. ***Insurance Corporation of Ireland Limited***
Parent Companies:

Insurance Corporation of Ireland Limited, now known as Icarom, is wholly-owned by ministers of, and in trust for, the government of the Republic of Ireland.

Subsidiaries (except for wholly-owned):

None.

17. ***British Northwestern Insurance Company Limited***
Parent Companies:

British Northwestern Insurance Company Limited is wholly-owned by Armco Insurance Group Inc. which is, in turn, wholly-owned by Armco Financial Services Corporation which is, in turn, wholly-owned by Armco, Inc.

Subsidiaries (except for wholly-owned):

None.

18. ***Underwriters at Lloyd's, London***
Parent Companies:

The Underwriters at Lloyd's, London are natural persons.

Subsidiaries (except for wholly-owned):

None.

19. ***Affiliated FM Insurance Company***
Parent Companies:

Affiliated FM Insurance Company is a wholly-owned subsidiary of Allendale Associates, Inc., which is, in turn, a wholly-owned subsidiary of Allendale Mutual Insurance Company.

Subsidiaries (except for wholly-owned):

None.

No. 93-1797

(5)

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In The

Supreme Court of the United States

October Term, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

v.

MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENT MORTON'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a petition for a writ of certiorari challenging the New Jersey Supreme Court's decision as violative of Due Process be granted when the Petitioners prevailed below, the state supreme court provided them an opportunity to be heard, and the court's decision bound the Petitioners to their representations filed with the state regulatory agency responsible for approving the so-called "pollution exclusion clause" for use in their private contracts of insurance?

2. Should a petition for a writ of certiorari be granted on the grounds that the decision below conflicts with holdings of this Court under the Due Process Clause?

RULE 29.1 STATEMENT

The subsidiaries (other than wholly-owned subsidiaries) of Respondent Morton International, Inc. are listed below:

(a) Morton Nichiyu Co., Ltd.

(b) Morton Yokohama, Inc.

(c) Nippon-Bee Chemical Co., Ltd.

(d) Toyo-Morton, Limited

(e) Ecuatoriana, de Sal y Productos Quimicos C.A.

(f) Morsecor, C.A.

(g) Dr. Renger G.m.b.H. & Co., K.G.

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No. 93-1797

In The

Supreme Court of the United States

October Term, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

v.

MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of New Jersey

RESPONDENT MORTON'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Morton International, Inc. ("Morton") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the New Jersey Supreme Court's decision below.

CONSTITUTIONAL PROVISION INVOLVED

This case presents no basis for raising a claim under the Fourteenth Amendment to the United States Constitution that would warrant this Court's exercise of jurisdiction.

COUNTERSTATEMENT OF THE CASE

On July 21, 1993, the New Jersey Supreme Court rendered its long-awaited decision on New Jersey environmental insurance coverage in *Morton International, Inc. v. General Accident Insurance Company*, 134 N.J. 1, 629 A.2d 831 (1993) (Petitioners' Appendix ("P.App.") 1a-113a). The decision ended seven years of insurance coverage litigation and resulted in a determination that the Petitioners and other carriers owed no duty of defense or indemnification to their insured, Morton. This 96-page unanimous decision was issued after oral argument and after consideration of numerous briefs and thousands of pages of record material submitted by all parties and *amici*.

The state court's opinion devoted its analysis and attention to numerous environmental insurance coverage issues that have plagued the courts throughout the country. The court resolved such state contract-law issues as the meaning of the "occurrence clause," the meaning of "damages," the definition of "accident," the application of the "duty to defend" and the interpretation of the "pollution exclusion clause."

While holding for the carriers on the pollution exclusion clause and deciding that Morton was not entitled to coverage for indemnity or defense, the court also determined that the Petitioners had grossly misrepresented to New Jersey regulators the true intended purpose of that exclusionary clause. Consequently, the court held the carriers bound to their representations and only permitted enforcement of the clause as limited to those representations. Even this decision, however, expanded the

numbers and types of cases in which the carriers could assert that the clause barred coverage.[1]

Contrary to the assertions made by Petitioners in their Brief before this Court, the New Jersey Supreme Court did not invoke the theory of estoppel *"sua sponte."* This theory was specifically acknowledged by Petitioners in their brief filed with the New Jersey Supreme Court on June 29, 1992. In that brief, Petitioners stated in reference to the then-recent West Virginia Supreme Court of Appeals decision in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 187 W.Va. 742, 421 S.E.2d 493 (1992), and the New Jersey Appellate Division decision in *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), that those cases suggest

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[1] Prior to the *Morton* decision, the lower courts in New Jersey had for many years construed the pollution exclusion clause to be ambiguous and co-extensive with the "occurrence" provision. *See, e.g., Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987); *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982); *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Law Div. 1975), *aff'd o.b.*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977). Under this line of cases, an insured was entitled to coverage if it could be shown that the resulting *damage* was not "expected or intended." The *Morton* decision modified *Broadwell* by construing the pollution exclusion clause to provide coverage identical with that provided under the prior occurrence-based policy, except that the clause was interpreted to bar coverage in those cases where the *"insured* intentionally *discharges* a known pollutant." 134 N.J. at 78, 629 A.2d at 875 (emphasis in original and supplied).

> the proponents of the pollution exclusion are *estopped* from giving any real effect to the pollution exclusion because of one construction of certain isolated statements in the [IRB] memorandum that was submitted in most jurisdictions. [Respondent Morton's Appendix ("R.App.") 64a; emphasis added].

In *Joy Technologies*, the West Virginia Supreme Court of Appeals applied the principle of judicial or regulatory estoppel to Liberty Mutual (one of the Petitioners here), stating:

> Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies. [187 W. Va. at 746, 421 S.E.2d at 497].

In response to that decision, carrier *amicus* Aetna Casualty & Surety Company ("Aetna") moved on June 25, 1992 to expand the record before the New Jersey Supreme Court, proposing to add in excess of 1,500 additional pages of regulatory and drafting history relating to the pollution exclusion clause (R.App. 8a-42a). Petitioners Insurance Company of North America ("INA") and American Home Assurance Company ("American Home"), together with Respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies ("Lloyd's"), joined Aetna's successful motion to expand the record (R.App. 66a-69a) and in

so doing adopted Aetna's submission that included, among other things, the following sworn statement:

> Aetna submits it is in a unique position to brief on behalf of insurers the drafting and regulatory history of those policy provisions and the way they were understood by policyholders. Its counsel herein have devoted many hundreds of hours researching, analyzing and compiling thousands of documents on this subject from the files of the Insurance Service Office, insurance brokers, state insurance commissioners, policyholder's insurance and manufacturing trade associations, the federal Environmental Protection Agency, and publicly available insurance materials. . . .
>
> At the risk of being presumptuous, and based upon the fact that Aetna is not aware that any other carrier has ever presented this evidence to courts, it is believed that Aetna and counsel herein are the only ones in the country who have developed the wealth of industry-wide information and data Aetna proposes to make available in this briefing. Indeed, other insurers opposed Aetna's efforts, asserting that it is never necessary to go beyond plain policy language and resort to extrinsic evidence. [R.App. 6a-7a].

Aetna further explained in its supporting brief that it had

> compiled a full history demonstrating the true import and complete context of such extrinsic evidence. To the best of Aetna's knowledge, it has never before been presented to any state Appellate or Supreme Court. [R.App. 42a].

This motion to expand the record, along with the *Joy Technologies* decision rendered by the West Virginia high court, prompted additional efforts to expand the record before the New Jersey Supreme Court, including the New Jersey Attorney General's motion to place the full New Jersey regulatory filings before the court. In its *amicus* brief, the Attorney General again placed the estoppel issue in front of all parties when he argued that the court should "bind" the insurance industry to its representations made in the early 1970s to state regulators when seeking approval of the pollution exclusion clause in private insurance contracts (R.App. 77a-78a).

Petitioners' complaint that Morton and *amici* did not argue the estoppel issue is another mischaracterization of the record. Both policyholder *Amici* New Jersey League of Municipalities ("League") and Allied-Signal group ("Allied") specifically identified the issue in their briefs filed in late June, 1992. The League, relying on *Joy Technologies*, stated:

> Similarly, Liberty Mutual and the other insurance companies that took part in the filings submitted to New Jersey *or* West Virginia should be estopped from taking a position here that is inconsistent with these prior representations made to the commissioners that the "exclusion was a mere clarification of existing coverage." [R.App. 59a; emphasis in original].

Allied likewise argued:

> The West Virginia Supreme Court of Appeals has just reminded us that no more than anyone else are insurers allowed to escape the force of

> "studied, unambiguous, official and affirmative" representations on which they mean public authorities to rely. [R.App. 56a].

Morton argued to the trial court that the regulatory filings of the carriers were critical to the outcome of the case (R.App. 1a-2a). The precise IRB explanatory memorandum that accompanied the carriers' regulatory filing nationwide was placed in the trial record in 1987 by Morton and was specifically relied upon as evidence of what Morton argued, at that time, was ambiguous language contained in the insurance policies (R.App. 3a-5a). This is the same explanatory memorandum that has been the critical document analyzed by courts nationwide including the trial, intermediate appellate and supreme court in this case.

Morton consistently argued below that the ambiguous policy language should be construed in accordance with the regulatory representations made by the carriers (R.App. 1a-5a; 47a-52a). The two lower state courts agreed with that argument. The New Jersey Supreme Court concluded that the exclusionary language was not ambiguous but could not be enforced because of the regulatory representations made by the carriers. Thus, either way, Morton's argument that the carriers' 1970-71 regulatory filings should prevail over their present interpretation was accepted at each judicial level in this case.

Petitioners cannot have it both ways. They actively supported and adopted the above statements made by Aetna in seeking to expand the record before the New Jersey Supreme Court and were ultimately successful in doing so. They were clearly made aware of the critical nature of the regulatory representations from the very

beginning of the case, and the issue of estoppel was most specifically brought home to them by cases outside the jurisdiction as well as the briefs filed in *Morton*.[2]

Petitioners' argument is also undermined by the supreme court's ruling to further expand the record to include additional (in excess of 40) affidavits filed in support of Petitioners' motion for reconsideration and modification of the supreme court's decision. While accepting the affidavits and considering additional briefs of Petitioners, the court nevertheless declined to modify its decision (*See* P.App. 202a; 232a-248a; Petitioners' Brief ("P.B.") at p. 11, n. 14). This case thus simply fails to provide a basis to deviate from this Court's long-standing policy of denying certiorari in cases which fundamentally involve issues of state law and private contracts.[3]

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[2] The regulatory history of the pollution exclusion clause was significantly relied upon by other courts prior to the decision in *Joy Technologies. See, e.g., Just v. Land Reclamation, Ltd.*, 155 Wis.2d 737, 456 N.W.2d 570, 574-75 (1990); *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1197-98 (3d Cir. 1991).

[3] This Court has stressed that the "decisions of the highest court of a state on matters of state law are in general conclusive upon us . . . ." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Guided by this long-standing principle, this Court has consistently denied certiorari in cases involving insurance coverage disputes, including environmental matters, the resolution of which is governed by state law. Indeed, carriers, including some of the Petitioners herein, have argued this point to this Court in opposing petitions of this very nature in the past. *See, e.g., Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St. 3d 657, 597 N.E. 2d 1096 (Ohio, 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1585 (1993); *Tonka Corp. v. Bituminous Cas. Corp.*, 9 F.3d 51

In addition, Petitioners argue that the concept of "equitable" estoppel requires a plenary hearing and proofs of various elements including reliance by the affected parties. In so arguing, Petitioners ignore the import of what the New Jersey Supreme Court did. The state court's decision is predicated upon the concept of "regulatory" estoppel; the court bound the insurance industry to the representations it made in 1970-71 to New Jersey regulatory authorities with respect to the alleged meaning of the pollution exclusion clause which was ultimately approved on the basis of those representations. This state-law principle means that if you are in a regulated industry and you make representations to those charged with the responsibility of administering and overseeing that public process, the New Jersey Supreme Court will hold you to those representations.

(8th Cir. 1993), *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3750, 3754 (1994); *Broderick Ins. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 189 (1992); *Continental Insurance Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Borden, Inc. v. Affiliated F&M Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners Were Not Denied Due Process of Law.

It has long been this Court's practice to decline review of a case when the party appealing was successful below. *See, e.g., Public Service Comm'n v. Brashear Freight Liners, Inc.*, 306 U.S. 204, 206 (1939). Whether this principle is embodied in the legal concepts of speculative adjudication, mootness, standing, or absence of case or controversy, it stands for the basic proposition that this Court's jurisdiction is discretionary and should not be exercised lightly in a case in which the appealing party has already been successful below.

Assuming that these Petitioners can invoke this Court's jurisdiction, this is not an appropriate case in which to exercise that jurisdiction. Without specifically identifying the basis for certiorari, Petitioners argue that they were denied due process by the procedural manner in which the state supreme court rendered its decision below. This is not true.

Fundamentally, due process of law is a flexible concept. It requires a protected property interest, state action, notice and an opportunity to be heard. *See, e.g., Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972). From a due process perspective, there is a serious question whether a judicial decision of a state's highest court interpreting a private insurance contract under state law principles can ever constitute state action interference with a protected property interest.

We ask the Court to note that, prior to the supreme court's decision in *Morton*, the courts in New Jersey had interpreted the pollution exclusion in strict accordance with the regulatory submission of the carriers. *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.* 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), held that the pollution exclusion clause was merely a restatement of the "occurrence" definition. Thus, when the state supreme court overruled *Broadwell* in part, it did not deprive the carriers of any interest.

Similarly, the Fourteenth Amendment requires state action. It has been recognized that a state supreme court's decision may constitute state action in the appropriate context. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Nonetheless, not every state supreme court decision constitutes the type of state action contemplated by the Fourteenth Amendment. *Kraemer* recognized that state action in the nature of enforcing a racially discriminatory provision of a deed could satisfy the requirements of the Fourteenth Amendment. 334 U.S. at 13-14. That case does not stand, and no reported decision has been found to stand, for the proposition that an interpretation given to a private contract by a state supreme court constitutes state action entitling the parties to challenge that decision under the Fourteenth Amendment. The actions of the supreme court below do not constitute the type of state action contemplated by the Due Process Clause.

Even if one reaches the question of whether the Petitioners received an opportunity to be heard in this case, the record demonstrates clearly that the Petitioners not only had full, complete and adequate notice but also had

ample opportunity to be heard. This Court has recognized that the Due Process Clause dictates no particular form of procedure, rather only that there be a meaningful opportunity to be heard at a meaningful time. Nor is an evidentiary hearing a prerequisite to due process. *Kremer*, 456 U.S. at 482; *Matthews*, 424 U.S. at 333-34. These two guiding principles were more than met by the proceedings in the New Jersey Supreme Court.

The carriers were on notice that the regulatory filings were critical to the outcome of the case and fully understood that the concept of regulatory estoppel was placed squarely before the New Jersey Supreme Court. They had a full opportunity to respond and provide whatever record material they chose to influence the court to reach a decision favorable to them. There are numerous record citations demonstrating those points, including:

1. Morton argued before the trial court (as well as in the intermediate appellate court and supreme court) that the IRB explanatory memorandum was crucial in the interpretation of the pollution exclusion, quoting the document in full (R.App. 1a-5a; 47a-52a).

2. The holding of *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), which was followed by both the trial and intermediate appellate courts below (*see* P.App. 153a-156a), relied on the history of the regulatory filings in part to support its conclusion that the pollution exclusion clause was ambiguous and was co-extensive with the occurrence clause.

3. Petitioners' brief in the supreme court acknowledged that estoppel was a critical issue in the case more

than five months before oral argument and prior to additional briefing and the expansion of the record to address that very issue (R.App. 64a).

4. *Amicus* Aetna moved to expand the record to include over 1,500 pages of regulatory and drafting history of the pollution exclusion clause that it asserted in a sworn statement constituted the most extensive in the United States (R.App. 7a-46a).

5. Petitioners joined in that motion, adopting Aetna's representations to the supreme court (R.App. 66a-69a).

6. Aetna's motion to expand the record and the Petitioners' joinder in that motion took place soon after the estoppel issue had served as the basis for the West Virginia Supreme Court of Appeals decision in *Joy Technologies* (R.App. 8a; 66a-69a).

7. *Amici,* the League and Allied specifically identified the estoppel concept as applicable to this case, arguing that the carriers should be estopped from dishonoring the plain import of their explanatory memorandum submitted to state regulatory officials nationwide (R.App. 53a-60a).[4]

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[4] The New Jersey Supreme Court described that explanatory memorandum as "misleading", "untrue", "indefensible", "perilously close to deception", "inaccurate", "astonishing", "lacking in candor", "not straight forward" and "paradigms of understatement". *Morton,* 134 N.J. at 37-40, 629 A.2d at 852-54.

We also note that Petitioners initially resisted all efforts to introduce extrinsic evidence on drafting or regulatory history. They joined in Aetna's motion to expand the record a few weeks after *Joy Technologies* was decided. Petitioners joined in Aetna's

8. *Amicus* New Jersey Attorney General moved to expand the record so that an accurate and complete record of the New Jersey regulatory history would also be considered by the court. Notably absent from the carriers' complete and comprehensive 1500 pages of regulatory and drafting history were any documents relating to the New Jersey regulatory history. Petitioners opposed the Attorney General's effort to place that material on the record before the supreme court (R.App. 70a-76a).

9. All these materials were submitted prior to oral argument. Further, the carriers filed before oral argument a response brief specifically addressing the Attorney General's submission on the New Jersey regulatory filings (R.App. 79a-81a).

10. Although the Attorney General argued the state's regulatory history at oral argument, Petitioners did not.

11. Following oral argument, the court requested and accepted from the parties additional commentary articulating different points of view with regard to the drafting and regulatory history of the pollution exclusion (R.App. 82a-84a).

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motion because they were concerned about the impact of *Joy Technologies* in relation to the arguments being made before the New Jersey Supreme Court. Consequently, Petitioners elected to join Aetna's submission of the most comprehensive set of materials on regulatory and drafting history anywhere in the country, thereby reversing their previous position on the issue of introducing extrinsic evidence.

12. After the supreme court rendered its decision on July 21, 1993, the carriers requested an extension of time to file motions for reconsideration, which the court granted (R.App. 85a). In their motions for reconsideration, the carriers fully briefed their due process claim (R.App. 86a-89a). In support of their motion, they also submitted 44 additional affidavits and sought the court's acceptance of those affidavits into the record. These affidavits could have been presented at every previous level of decision in this case.[5]

Clearly, Petitioners were given and took advantage of every opportunity to brief the relevant issues and expand the record in order to influence the court and be heard.

Petitioners request an evidentiary hearing so they can offer testimony on whether regulators 24 years ago understood the "true meaning" of the pollution exclusion despite the misleading explanation the insurers provided when they sought approval of that exclusion. We can only note that Petitioners raise no factual dispute as to the content or the submission of the explanatory memorandum. Petitioners also raise no factual dispute that they offered no other explanation in writing to assist the New Jersey regulators to understand the significant reduction

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[5] For example, following the decision in *Joy Technologies*, Aetna sought to include in its motion to expand the record the affidavit of Samuel Weese, former West Virginia Commissioner of Insurance, dated July 7, 1992, which repudiated his previous affidavit of 1988 (R.App. 43a-46a). The 1992 Weese affidavit was substantially similar to the 44 affidavits submitted by Petitioners a year later in support of their motion for reconsideration.

in coverage that they now say they accomplished by imposing that exclusion.

Under New Jersey law, review of an administrative agency's decision takes place in the first instance in the intermediate appellate court based on the record on file in the agency. *See N.J. Court Rules* 2:2-3(a)(2); 2:5-4; *Pascucci v. Vaggott*, 71 N.J. 40, 53-54, 362 A.2d 566, 573-74 (1976). Review of an agency decision to approve a pollution exclusion in an insurance contract would have followed that procedure rather than a trial-type evidentiary hearing. Petitioners propose to go far beyond the documentary record to prove the mental processes of the regulators. As the Attorney General's brief in opposition to the carriers' reconsideration motions pointed out, the documentary record is the only reliable record for an administrative decision; private conversations with individual regulators or undisclosed thoughts would be impossible to confirm as the basis for an administrative decision. In fact, several of the New Jersey regulators responsible for the final decision are deceased and unable to rebut or support the statements of the single New Jersey regulator offered by the carriers (R.App. 90a-92a).

Even if the regulators who reviewed the exclusion were available, their mental processes in reaching the decision to approve the exclusion would be privileged. New Jersey courts have seldom, if ever, allowed depositions or trial testimony of members of the executive branch in light of the public interest in the executive's ability to carry out its decisional and consultive functions freely. *See Nero v. Hyland*, 76 N.J. 213, 225-26, 386 A.2d 846, 853 (1978); *N.J. Turnpike Authority v. Sisselman*, 106

N.J. Super. 358, 367, 255 A.2d 810, 814-815 (App. Div. 1969), *certif. denied*, 54 N.J. 565, 258 A.2d 16 (1969).

In sum, the New Jersey Supreme Court provided Petitioners and all parties a full and ample opportunity to present any and all evidence that they believed constituted the regulatory or drafting history of the pollution exclusion clause. In fact, one of the Petitioners herein, American Home, joined by Lloyd's, urged the supreme court to accept Aetna's more than 1500 pages of drafting and regulatory history, stating:

> It is the undersigned insurers position that the Aetna *amicus* brief and the appendices referenced thereto have given the Court a fair and complete picture of the derivation of the pollution exclusion. Should this Court or a lower court in remand wish to consider the issue of extrinsic evidence, the Aetna motion should be granted. [R.App. 66a-67a].

Even if the Petitioners were entitled to present a due process claim to this Court on this petition, they have failed to demonstrate that any violation of due process took place or that it could possibly serve as a basis for this Court's grant of a writ of certiorari.

2. There Are No Special Or Important Reasons That Exist For Granting Certiorari Because The Decision Below Does Not Conflict With The Holdings Of This Court In *Ohio Bell Tel. Co. v. Public Utils. Comm'n* and *Saunders v. Shaw*.

Sup. Ct. R. 10 sets forth the considerations governing this Court's review of a writ of certiorari. That Rule prescribes that a petition will be granted only when there

are "special and important reasons" to do so. The Rule also sets forth the "character of reasons" that this Court will consider in reviewing such applications. The only reason offered in Petitioners' Brief for the Court's favorable consideration of their petition is that the New Jersey Supreme Court "has decided a federal question in a way that conflicts with applicable decisions of this Court." *Sup. Ct. R. 10.1(c)* (*See* P.B. at p. 12).

To satisfy this requirement, Petitioners rely heavily upon the decisions of this Court in *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937), claiming they squarely conflict with the decision below. That reliance is misplaced.

a. *Saunders*

In *Saunders*, the complainant had *no* opportunity to present his case to the Louisiana Supreme Court. Because of a state rule permitting only one re-hearing in any given matter, the petitioner therein was also foreclosed from asking the court to reconsider its decision and consider complainant's defense. 244 U.S. at 320.

As has been amply pointed out above, Petitioners in this case were not only made aware of the issues in front of the state supreme court *initially* and given the opportunity to submit whatever record evidence they chose to present, but they were also given an extensive opportunity to pursue a motion for re-hearing (reconsideration) to the state supreme court. In that reconsideration motion they extensively briefed the due process issue and added an additional 44 affidavits to the record, presenting what they contended to be the necessary basis for the supreme

court to reconsider its ruling and modify it. There is no comparison whatsoever between the record and opportunity granted Petitioners to be heard in the case below and the record and opportunity granted to the complaining party in *Saunders*.

This Court in *Saunders* noted there may be a remedy gap,

> when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record . . . . [244 U.S. at 320].

The decision of the supreme court below was not done *unexpectedly* at the *end* of the proceeding, and it was certainly not done when Petitioners no longer had any right to add to the record. The record below clearly demonstrates that Petitioners not only had a right to add to the record, but in fact did add to the record and their motions to do so were granted by the state supreme court. Obviously dissatisfied with their previous efforts, Petitioners now come before this Court seeking yet another opportunity to achieve *their* interpretation of the pollution exclusion clause, this time in the guise of the Due Process Clause. *Saunders* does not help them.

b. *Ohio Bell*

Ohio Bell involved orders of the Ohio public utilities commission resulting from a proceeding to determine whether rates charged by a telephone company were excessive. Petitioners argue that the state agency's handling of the hearing on the rate challenge in *Ohio Bell* is

comparable to the supreme court's decision here.[6] Even a cursory reading of *Ohio Bell* demonstrates the fallacy of that argument. As this Court observed:

> Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. [301 U.S. at 300].

Petitioners can hardly claim here that the state court's decision on the pollution exclusion clause was "without warning or even the hint of warning." The fact is the carriers' *amici* and the parties all knew that the issue involving the pollution exclusion clause included the possibility that the New Jersey Supreme Court would decide to bind the carriers to the representations they made to state regulatory agencies when they sought approval of the pollution exclusion endorsement. The carriers represented to the state supreme court prior to its initial decision and prior to oral argument that they believed that their *amicus* Aetna and its counsel "are the only ones in the country who have developed the wealth of industry-wide information and data Aetna propose[d] to make available in this briefing" (R.App. 7a).

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[6] We note, as Petitioners concede at page 12 of their Brief, that the principles enunciated in *Ohio Bell* have never been applied by this Court to a state appellate court. There is no reason to do so here.

Further, unlike the unique situation presented in *Ohio Bell*, the case below was decided upon voluminous information submitted by all parties including *amici*. There is no hint here that any information was "secretly collected and never yet disclosed" throughout the course of the supreme court's decision below. The information the court relied upon was disclosed long before its own decision and known to the Petitioners for many years.

In addition, Petitioners were given the opportunity to seek reconsideration and permitted to place into the record an additional 44 affidavits that Petitioners argued should cause the supreme court to modify its opinion. Although they had many months to submit these affidavits prior to the court's initial decision, Petitioners in their continuing effort to have it both ways waited until the court's decision. This was true despite the fact Aetna had already introduced into the record on their behalf what the carriers represented was the complete drafting and regulatory history of the pollution exclusion.

Moreover, this Court noted in *Ohio Bell* that even the eventual decision of the commission did not disclose the underlying basis for the conclusions reached, observing that "[t]he putative debtor does not know the proofs today." 301 U.S. at 300. That is not this case. There were no secret proceedings below involving a state administrative agency. Any deception practiced below was found to be that of the Petitioners. Petitioners are challenging here the conduct of the state supreme court whose operations were open, notorious, on the record and actively participated in by all parties and their amici, including these Petitioners.

In sum, *Saunders* and *Ohio Bell* are inapposite and Petitioners' efforts to utilize these cases to support a petition for a writ of certiorari to this Court do not hold up under scrutiny.[7]

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[7] We point out that there is currently pending before Congress proposed legislation regarding Superfund Reauthorization ("Superfund Reform Act of 1994"; S. 1834, H.R. 3800) ("SRA"). Title VIII of the SRA, entitled the "Environmental Insurance Resolution and Equity Act of 1994," proposes the creation of an "Environmental Insurance Resolution Fund" that would specifically address the resolution of state law issues that are raised, like the present issue, in environmental insurance coverage litigation. This is but an additional factor that further militates in favor of denying the present petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION

MORTON THIOKOL, INC., Plaintiff, vs. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*, Defendants.	Docket No. C-3956-85 PLAINTIFF'S BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO CERTAIN CARRIER DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

* * *

In equating the ISO form with the definition of occurrence, the court in *Jackson Township MUA* acted consistently with the stated intent of the IRB in promulgating the clause and the demonstrated intent of the insurers that imposed it on their insured. In circulating the ISO form to its members, the IRB explained:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion *clarifies* this situation so as to avoid any

> questions of intent. *Coverage is continued* for pollution or contamination caused injuries with the pollution or contamination resulting from an *accident*. . . . (Emphasis added.)
>
> IRB Circular Number 208, App. Vol. IV, Tab 1, pp. ISO 28, ISO-30.

Commentators support this interpretation:

> Pollution: Exclusion (f) is new. It eliminates coverage for damages arising out of pollution or contamination, where such damage appears to be expected or intended on the part of the insured and hence are excluded by definition of "occurrence."

3 R. Long, *Law of Liability Insurance*, Appendix C at 58. Moreover, the insurers effectuated this interpretation by imposing the ISO form on their insured without any reduction in premium for the coverage purportedly excluded, evincing an understanding that no current coverage was being removed.[196] The *Jackson Township MUA* holding is, thus, in complete accord with the insurance industry's treatment of the ISO form.

* * *

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Plaintiff
Morton Thiokol, Inc.

By:_____
Edward C. Laird

---

[196] See Affidavit of George W. Floyd, ¶5; App. Vol. IV, Tab 6.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-895-89T3

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*

Defendants-Respondents.

APPENDIX VOLUME VII

MORTON INTERNATIONAL, INC.

---

* * *

INSURANCE RATING BOARD

May 15, 1970

CIRCULAR TO BOARD MEMBERS AND
ASSOCIATE MEMBERS
General Liability #206

CONFIDENTIAL

- - -

Effective June 10, 1970

- - -

Gentlemen:

Contamination and pollution exclusions, as described below, have been filed or will be filed in all jurisdictions to be effective June 10, 1970, in accordance with the rule of application shown in the latter part of this letter. These exclusions will apply to all general liability insurance covering bodily injury and property damage except comprehensive personal and farmers comprehensive personal liability and professional liability insurance.

The exclusions wordings are as follows:

> Contamination or Pollution Exclusion. Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

* * *

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

* * *

APPENDIX C

MORTON INTERNATIONAL, INC. Plaintiff-Appellant/ Petitioner vs. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al., Defendants-Respondents/ Cross-Petitioners.	SUPREME COURT OF NEW JERSEY Docket No. 34,341 *CERTIFICATION OF VICTOR C. HARDWOOD, III IN SUPPORT OF AETNA'S MOTION TO APPEAR AS AMICUS CURIAE*

I, VICTOR C. HARDWOOD, III, do hereby certify as follows:

* * *

8. Aetna submits it is in a unique position to brief on behalf of insurers the drafting and regulatory history of those policy provisions and the way they were understood by policyholders. Its counsel herein have devoted many hundreds of hours researching, analyzing and compiling thousands of documents on this subject from the files of the Insurance Service Office, insurance brokers, state insurance commissioners, policyholders' insurance and manufacturing trade associations, the federal Environmental Protection Agency, and publicly available insurance materials.

* * *

10. Based upon comments in reported cases, discussions with other insurer counsel, and briefs heretofore filed in environmental litigation throughout the country, it appears this evidence has never before been presented to courts except recently by Aetna's counsel herein. Indeed, the reported cases reveal that courts nationwide, including New Jersey's lower courts, have only considered the barest handful of documents, if any. They have reached their conclusions in a vacuum supported only by other cases of the same sort and comments from articles primarily authored by counsel who represented policyholders. Those articles make adversarial arguments which courts have incorrectly accepted as impartial, factually accurate reports.

11. At the risk of being presumptuous, and based upon the fact that Aetna is not aware that any other carrier has ever presented this evidence to courts, it is believed that Aetna and counsel herein are the only ones in the country who have developed the wealth of industry-wide information and data Aetna proposes to make available in this briefing. Indeed, other insurers opposed Aetna's efforts, asserting that it is never necessary to go beyond plain policy language and resort to extrinsic evidence.

* * *

APPENDIX D

SUPREME COURT OF NEW JERSEY

Docket No. 34,341

Plaintiff(s) – Appellant/Petitioner MORTON INTERNATIONAL, INC., vs. *Defendant(s)* – Respondents/ Cross-Petitioners GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.	**CERTIFICATION OF VICTOR C. HARWOOD, III**

I VICTOR C. HARWOOD, III, do hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and a partner of the firm of Harwood Lloyd, Esqs. I am the attorney in charge of this firm's representation of the Aetna Casualty and Surety Company (hereinafter "Aetna") in this matter and I am fully familiar with it.

2. This Court granted Aetna's motion for leave to participate as *amicus curiae* by order dated May 26, 1992. This Certification is made in support of Aetna's motion to clarify the Court's May 26, 1992 order granting Aetna's motion for leave to appear as *amicus curiae* or, in the alternative, to expand the record below *nunc pro tunc* and file a supplemental appendix.

3. As part of Aetna's motion, and for the Court's convenience, Aetna has submitted copies of those documents it seeks to present to this Honorable Court. Those documents are contained in Volumes I, II, III and IV of Aetna's "Supplemental Appendix" ("Asa").

4. Many of the documents contained in Aetna's supplemental appendix were produced during the course of discovery in the following related cases:

"*Morton I*" – the underlying lawsuit upon which this appeal is based – *Morton Thiokol v. General Accident Insurance Company of America, et al*, Docket No. C-3956-85 (N.J. Super. Ch. Div.);

"*Morton II*" – a lawsuit involving the same policyholder, but different sites – *Aetna Casualty & Surety Co. v. Morton Thiokol, et al*, Docket No. L-41046-87 (N.J. Super. Law Div.) (formerly C-3348-86E); and

"*Morton III*" – a lawsuit filed by Thiokol in Ohio – *Morton Thiokol, Inc. v. Aetna Casualty & Surety Co.*, No. A8603799 (Ohio Ct. Common Pleas).

5. Discovery in all Morton cases was coordinated by the various trial courts. The relevant orders are attached to the Supplemental Appendix at Asa 179-180; trial court order entered in "*Morton II*" dated July 30, 1986: " . . . all discovery in either case ("*Morton I*" and "*Morton II*") shall be available for use by all parties in each case." See also, Asa 181-185 at Asa 184-185; Case Management Order I entered in "*Morton II*" on October 30, 1986, par. 9, which

coordinates *"Morton I"* and *"Morton II"* discovery with other Morton cases pending in Ohio (*"Morton III"*) and Illinois.

6. Thus, counsel for Thiokol participated in and had access to all discovery in the *Morton I, II* and *III* litigations.

7. For the Court's convenience, all of the documents contained in the supplemental appendix which were obtained through discovery in the *"Morton I, II* and *III"* litigations are indexed according to footnote or text location where Aetna's *amicus* brief or memorandum in support of this Motion reference those documents. Further, the indexes identify the *"Morton I, II* and *III"* discovery source in which they were included. Some discovery sources, such as ISO, produced documents which remain "confidential" under protective order. All of the documents mentioned in the Mealey's articles discussed in Aetna's *amicus* brief are public. The few documents which remain protected are only discussed in the memorandum submitted in support of the motion to file a supplemental appendix. For that reason said memorandum and supplemental appendix are filed under seal. A description of each index is set forth at pages 4-6 of Aetna's Memorandum in Support of this Motion which urges the Court to file and consider the supplemental appendix. The indexes are located at Volume IV, Asa 1092-1108.

8. Any document used in this supplemental appendix which was not obtained through discovery in the *"Morton I, II* and *III"* litigations was obtained through Aetna's informal discovery efforts, *i.e.*, either through: a)

publicly available document searches; or b) unprotected document sources.

9. Searches for publicly available and unprotected documents were made at the following locations: United States Environmental Protection Agency, policyholder insurance and manufacturing trade associations, insurance brokers and broker trade associations, state insurance commissions, College of Insurance, various law libraries and other public libraries.

10. The types of documents which constitute publicly available documents are periodicals, magazine articles, books, speeches and the like.

11. Unprotected document sources include letters, memos, deposition transcripts, etc. which are not covered under any confidentiality agreements or orders.

I hereby certify that the above statements made by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment by the Court.

/s/ Victor C. Harwood, III
Victor C. Harwood, III

Dated: June 25th, 1992
Hackensack, New Jersey

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* Each (e)(2) and (e)(3) MTI Source document includes the Caption page of Bruton's Affidavit or Deposition.

Citation Reference Asa272-274	Asa1197
4/15/70 Agenda & Minutes – **MTI Source: (c)(1)**	Asa1198-1200
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4/22/70 Letter form Earle to Bruton – **MTI Source: (e)(2)**	Asa1225-1229
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5/2-4/61 Minutes – **MTI Source: (d)**	Asa1366-1380
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Exhibit I – **MTI Source: (c)(1)**	Asa1454-1458

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SUPREME COURT OF NEW JERSEY

Docket No. 34,341

Plaintiff(s) - Appellant/Petitioner	)
MORTON INTERNATIONAL, INC.,	)
vs.	)
Defendant(s) - Respondents/Cross-Petitioners	)
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.	)

BRIEF OF *AMICUS CURIAE* AETNA CASUALTY & SURETY COMPANY

STATEMENT OF THE ISSUES

Aetna is firmly committed to the proposition that the policy language in dispute is clear and unambiguous. No extrinsic evidence is required to demonstrate its plain meaning. Aetna is aware, however, that, like plaintiff (also sometimes referred to as "Morton", "Morton Thiokol", "Thiokol" or "MTI") herein, policyholder litigants and *amici curiae* cite out of context excerpts of extrinsic evidence, including the "drafting" and "regulatory" histories of the CGL policies, and cases referring to

such excerpts. Aetna has compiled a full history demonstrating the true import and complete context of such extrinsic evidence. To the best of Aetna's knowledge, it has never before been presented to any state Appellate or Supreme Court.

* * *

Respectfully submitted,

/s/ Victor C. Harwood, III
Victor C. Harwood, III
Brian J. Coyle
Edward Zampino
HARWOOD LLOYD
Counsel for Amicus Curiae,
Aetna Casualty & Surety
Company

HARWOOD LLOYD

COUNSELLORS AT LAW

July 21, 1992

Honorable Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, NJ 08625

RE: Morton International, Inc. v. General Accident
Docket No. 34,341

To The Honorable Justices of the New Jersey Supreme Court:

R. 2:6-11(d) authorizes the filing of a letter regarding recent relevant cases. Policyholder *amici* briefs have cited and rely quite heavily upon the recent case of *Joy Technologies v. Liberty Mutual*, No. 20153 (W. Va. Supreme Ct., June 11, 1992).[1] That case placed great emphasis upon a Declaration submitted by former Insurance Commissioner, Samuel H. Weese, in 1988 (slip op. at 15) in reaching its conclusion that insurance representatives represented to the commissioner that the pollution exclusion only clarified and restated occurrence coverage. Such Declaration is stated to vindicate *Broadwell* and " . . . proves the correctness of its holdings . . . "[2]

The Court should be made aware of on-going developments in the *Joy Technologies* case. On July 7, 1992,

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[1] Brief of *amici* Allied-Signal, Inc., at 43, 47, 50, 54, 55-56, 58; brief of *amicus* League of Municipalities, at 32, 35 n.36, 36-37 n.37, 40, 44-46.

[2] Brief of *amicus*, League, at 44.

former Commissioner Weese submitted a new affidavit (copy enclosed herewith). Liberty Mutual, defendant in *Joy*, has filed that affidavit with the West Virginia Supreme Court in support of its Petition for Rehearing. Liberty Mutual pointed out in its Petition that Weese stated his 1988 affidavit " . . . does not accurately reflect his recollection or the extent of his involvement in the hearing."[3] This affidavit was publicly published and editorially commented upon in 6 *Mealey's Insurance Litigation Reports* No. 35 (July 21, 1992).

Weese's July 7, 1992, affidavit is also submitted herewith for inclusion in Aetna's supplemental appendix as page Asa1523 in further support of Aetna's motion for leave to expand the record filed with this Court on June 26, 1992, which motion is presently pending unheard.

Respectfully submitted,

/s/ Victor C. Harwood, III
Victor C. Harwood, III

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[3] Petition of Liberty Mutual, at 5.

AFFIDAVIT

I, Samuel H. Weese, do depose as follows:

1. From 1969 to 1975, I held the position of Insurance Commissioner of West Virginia. In July of 1970, a hearing was held regarding the effect of various exclusions offered for approval including the qualified "sudden and accidental" pollution exclusion submitted by the Mutual Insurance Rating Bureau and the Insurance Rating Board.

2. I did not actively participate at the hearing or in the pre-hearing or post-hearing filing process. Although present at the hearing, as Insurance Commissioner, I appropriately delegated the filing process to others. I was not involved in the discussions of the legal complexities underlying the coverages provided by the policies as amended by the addition of the proposed pollution exclusion. I recall entering the hearing with the belief that coverage was generally excluded for normal operational polluting events and premiums charged did not reflect such coverage under the 1966 CGL policy. I also recall leaving the hearing with an assumption that, with the addition of the pollution exclusion, there continued to be no general coverage for normal operational polluting events. Therefore, without additional analysis, I assumed that the exclusion did not alter coverage, as none was intended initially.

3. The affidavit executed by me on November 11, 1988 in the *FMC v. Liberty Mutual* case does not accurately reflect my recollection as it tends to suggest that my involvement was extensive and that my memory of events was clear. In fact, my involvement was minimal and my recollection is only that there was generally no coverage for polluting events. To go further

would be to misrepresent my involvement in and my memory of such events.

4. In 1970, I understood that a "sudden" event was one which was identifiable in time and place. I also knew that an "accident" was an insurance term which contained a "sudden" element. In addition, I understood that the language of the occurrence definition focused upon unexpected or unintended damage.

5. The fact that the pollution exclusion was approved in West Virginia only as applicable to new or renewal policies and could not be attached to existing policies tends to indicate that the exclusion was generally perceived as a restriction.

/s/ Samuel H. Weese
SAMUEL H. WEESE

Dated: July 7, 1992
/s/ Mary Ann Brunett
Notary Public

APPENDIX E

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Petitioner,	:
v.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

PETITIONER'S BRIEF IN RESPONSE TO RESPONDENTS'/CROSS-APPELLANTS' BRIEF ON POLLUTION EXCLUSION AND "DAMAGES" CLAUSES

PRELIMINARY STATEMENT

The carriers ask this Court to believe that when they imposed the pollution exclusion clause in 1970, without fanfare and without the reduction of so much as one dollar of premium to the insureds, they intended to revolutionize the coverage afforded pollution risks so that the vast majority of pollution claims would for the first time be uninsurable. They have convinced some courts throughout the country of this intention, but they have not convinced New Jersey courts since 1975, nor have

they convinced either the trial court or the Appellate Division in this case.

New Jersey's consistent body of reported case law supporting the Appellate Division's construction of the "pollution exclusion" clause (*see, Broadwell Realty v. Fidelity and Casualty Co. of New York*, 218 N.J. Super. 516 (App. Div. 1987)) is compelling in its reasoning because it is driven by the principle, reaffirmed repeatedly by this Court, that policy language supporting more than one reasonable interpretation must be construed in favor of coverage. Although recognizing this controlling principle of construction, the carriers nonetheless argue, in the face of clearly conflicting evidence, that this Court should limit the broad policy language to one narrow meaning.

To reach the result urged by the carriers, this Court will have to ignore the abundant evidence considered by *Broadwell* and other courts, including: that the primary dictionary definition of "sudden" is unexpected; that insurance industry drafting precedent supports this interpretation of "sudden"; that the insurance industry's filings before state regulatory boards and the carriers' own representations characterized the pollution exclusion clause as a mere clarification of existing coverage.

* * *

That the pollution exclusion may be reasonably interpreted to support Morton's position is further confirmed by contemporaneous statements made by representatives of the insurance industry when the pollution exclusion

was promulgated.[9] The Appellate Division researched and reviewed statements of the Insurance Rating Board, the carriers' policy drafting group, that the pollution exclusion was merely a clarification of the occurrence definition, *Broadwell*, 218 N.J. Super. at 534 n.1. Based in part upon these contemporaneous interpretations by the carriers, the Appellate Division concluded that the phrase "sudden and accidental" must be interpreted as a restatement of the definition of occurrence in order to protect the reasonable expectations of the insured. 218 N.J. Super. at 536. Other courts have noted,

> [t]hat insurers publicly marketed the exclusion as a clarification, rather than a restriction of coverage, further indicates that "sudden and accidental" may mean, as the County suggests, unexpected and unintended. At the very least, we think that such comments on the part of the insurers corroborate the County's claim that the phrase is ambiguous.

New Castle, 933 F.2d at 1198.

Similarly, the Supreme Court of Georgia looked to the contemporaneous interpretations of the insurance industry when it determined that the phrase "sudden and accidental" was coextensive with "unexpected and unintended." *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989). *See also Diamond Shamrock*, ___ N.J. Super. at ___ (slip op. at 47-48), where the court

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[9] Some of the insurance industry's contemporaneous interpretations of that new form, suggesting its purpose was clarification, were presented to Judge Huot as part of the various cross-motions for summary judgment and are part of the record on this appeal (Pa 1341-1354; 1706-1724).

referred to contemporaneous public statements made by *amicus* Aetna as disclosing Aetna's "common understanding of the meaning of the standard pollution exclusion [as being] in accordance with *Broadwell.*"

The carriers' interpretation of the pollution exclusion clause as a mere clarification of the occurrence definition is further evidenced by the lack of any reduction in premiums when the clause was added to the policies. Had the pollution exclusion been drafted with the intent to substantially reduce or eliminate coverage, as Respondents now argue, clearly some reduction in premium would have accompanied its introduction.

Respondents attempt to shield the contemporaneous interpretations of their own industry from this Court by arguing that such extrinsic evidence may not be used to alter or vary the terms of the insurance contracts.[10] This argument is not only misleading, it is wrong as a matter of law. While it is true that extrinsic evidence is not

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[10] The defendants also argue that extrinsic evidence is never admissible to demonstrate a party's subjective intent, relying upon *Saul v. Midlantic Nat'l Bank/South*, 240 N.J. Super. 62 (App. Div.), *certif. denied*, 122 N.J. 319 (1990), and *Kook v. American Sur. Co. of New York*, 88 N.J. Super. 43 (App. Div. 1965). This line of cases is inapposite to the case at bar. In both *Saul* and *Kook*, a party to the contract was attempting to introduce evidence of *its own* unexpressed subjective intent. The courts in both cases correctly held that such unexpressed intentions were irrelevant to the interpretation of the contract. *Saul*, 240 N.J. Super. at 77; *Kook*, 88 N.J. Super. at 48. In the instant case, the relevant extrinsic evidence relates to the objective understanding of the parties as documented in the express representations of the insurance industry to various regulatory bodies and the public at large.

normally admitted to alter or vary the terms of an unambiguous contract, this Court has long held that extrinsic evidence may be used to interpret the terms of a contract, noting that "[s]urrounding circumstances" may shed light on the intent of the contracting parties. *Communication Workers of America, Local 1087 v. Monmouth County Bd. of Social Servs.*, 96 N.J. 442, 452 (1984); *Atlantic Northern Airlines v. Schwimmer*, 12 N.J. 293, 302 (1953); *Harker v. McKissock*, 12 N.J. 310, 322-23 (1953). This interpretive function is especially important when dealing with complex insurance contracts that, as this Court has noted, are often difficult to understand. *Sparks*, 100 N.J. at 335.[11] Thus, this Court is entitled to look to the insurance industry's contemporaneous interpretations of the exclusion in the record and to the public material contained in reported cases and published reference sources, and in so doing confirm that the phrases "sudden and accidental" and "discharge, dispersal, release or escape" are susceptible to more than one meaning.

Respondents argue that those courts that have considered the statements of the insurance industry interpreting the pollution exclusion clause as a clarification of

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[11] We note that *amicus curiae*, Aetna, argues for the inclusion of this material. Counsel's Certification in Support of Motion for Leave to Appear as *Amicus Curiae* at ¶11. Whether this conflict results from strategy or concern over the state of the extrinsic evidence itself, the disagreement only serves to reinforce the inherent ambiguity of the standard form exclusion. This Court has gone so far as to hold that, with regard to insurance contracts, resort to extrinsic evidence is proper even in the face of an unambiguous insurance policy. *Werner Industries v. First State Ins. Co.*, 112 N.J. 30, 39 (1988).

existing coverage were misled. They suggest that there is *other* evidence indicating some members of the industry intended the exclusion to limit coverage. Respondents' Brief at 44 n. 29. Regardless of the underlying validity of their argument, in so arguing Respondents concede the point. That the pollution exclusion clause was interpreted differently by members of the insurance industry, and that one of these interpretations supports Morton's position, is irrefutable proof that the clause is susceptible to more than one reasonable interpretation and should be construed so as to favor coverage.

* * *

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Plaintiff-Petitioner,
Morton International, Inc.

/s/ Edward C. Laird
GEORGE F. KUGLER, JR.
EDWARD C. LAIRD

Dated: June 8, 1992

OF COUNSEL

Thomas C. Hill
Taft, Stettinius & Hollister

ON THE BRIEF:

GARY J. LESNESKI

APPENDIX F

MORTON INTERNATIONAL, INC.,	:	SUPREME
	:	COURT
Plaintiff-Petitioner	:	OF NEW
	:	JERSEY
v.	:	DOCKET NO.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:	34,341
	:	
Defendants-Respondents	:	

BRIEF AMICI CURIAE OF ALLIED-SIGNAL, INC., THE AMERICAN FIBER MANUFACTURERS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, ARMSTRONG WORLD INDUSTRIES, INC., ATHLONE INDUSTRIES, INC., THE BOC GROUP, INC., THE CHEMICAL MANUFACTURERS ASSOCIATION, FLINTKOTE CO., HANSON INDUSTRIES, INTERNATIONAL BUSINESS MACHINES CORPORATION, J. T. BAKER, INC., NESTLE FOOD COMPANY, OLIN CORPORATION, OWENS-ILLINOIS, INC., PUBLIC SERVICE ELECTRIC & GAS COMPANY, REICHHOLD CHEMICALS, INC., ROHM AND HAAS COMPANY, SAFETY LIGHT CORPORATION, SANDVIK, INC., SCHERING-PLOUGH CORPORATION, USR INDUSTRIES INC., WARNER-LAMBERT COMPANY, WASTE MANAGEMENT, INC., AND WESTINGHOUSE ELECTRIC CORPORATION

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* * *

Fortunately, we now have received, within just the last week or so, the authoritative answer of the West Virginia Supreme Court of Appeals to any such argument. *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, No.

20153 (W. Va. June 11, 1992). . . . The West Virginia high court looked closely at the history we have recited, including of course particularly the West Virginia documents. It found unequivocally that the insurance groups that represented Liberty Mutual, the insurer before the court in the *Joy Technologies* case (and a party to this appeal), had "unambiguously and affirmatively represented to the West Virginia Insurance Commission that the [pollution exclusion] did not alter coverage under the policies involved" – coverage that extended to pollution damage "even if it resulted over a period of time and was gradual, so long as it was not expected or intended." Addendum B, slip op. at 17. Elsewhere the court spoke of Liberty Mutual as having made "studied unambiguous, official and affirmative representations" inconsistent with the temporal meaning attributed to the "sudden" of the pollution exclusion by an intermediate appellate court in Pennsylvania,[74] whose law Liberty Mutual was urging should be applied. *Id.* at 10. In those circumstances, the court said, to apply Pennsylvania law "would be inconsistent with, and contrary to, the public policy of this State." *Id.* The court's response to the latter-day insurance company argument thus was categorical: The insurance companies represented that the exclusion was a mere clarification and did not alter coverage; the state's insurance commissioner approved the pollution exclusion we are concerned with (and another not relevant to this case)

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[74] *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 383 Pa. Super. 558, 576-77, 557 A.2d 393, 402 (1989) (holding that the exclusion is unambiguous).

"only 'to the extent that said exclusions are mere clarifications of existing coverages,' " *Id.* at 17, and no insurance company was going to be allowed to avoid the effect of its "studied, unambiguous, official and affirmative" representations. Even the insurers cannot seriously contend that the standard form pollution exclusion was intended to mean one thing in West Virginia – a mere clarification of coverage – and something else, a huge cutback in coverage, in all the other states, including New Jersey.

C. EPA and NJDEP Regulations Referred to by the Insurers Are Irrelevant to the Question of the Meaning of a Provision in a Private Contractual Insurance Agreement.

The insurers refer to certain United States Environmental Protection Agency and New Jersey Department of Environmental Protection regulations (which distinguish between "sudden" and "gradual" occurrences) as "highly relevant" to the question of the meaning of the word "sudden" in the comprehensive general liability policy. (INA Cross-App. Br. 24-28.) . . .

The regulations are further irrelevant in that they were promulgated in the late 1970s and early 1980s, years after the pollution exclusion was developed and approved. Any such regulations could be relevant only if they shed light on a usage current at the time the pollution exclusion was approved. And, as was shown above (pp. 11-14), when the industry presented the pollution exclusion to state regulatory authorities in the early 1970s, it said it did not mean the word "sudden" to have

a durational connotation, and such a connotation had not been a part of the industry's usage of the term. Because the state regulatory authorities relied on the industry's representations, the insurers are bound by what they said at that time. *See supra* note 67. The West Virginia Supreme Court of Appeals has just reminded us that no more than anyone else are insurers allowed to escape the force of "studied, unambiguous, official and affirmative" representations on which they mean public authorities to rely. (*See supra* pp. 55-56.)

* * *

/s/ Clyde A. Szuch/dwk
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Attorneys for The American Fiber Manufacturers Association, The American Petroleum Institute, The Chemical Manufacturers Association, International Business Corporation, Olin Corporation and Rohm and Haas Company

APPENDIX G

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents.

AMENDED BRIEF OF *AMICUS CURIAE* NEW JERSEY LEAGUE OF MUNICIPALITIES

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* * *

C. The Insurance Industry Sought Approval of the Exclusion Clause on the Basis That it Was Only Clarification of Existing Coverage.

The IRB and the National Bureau submitted the polluter's exclusion to state insurance commissioners for approval.[36] The insurance industry specifically represented

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[36] Although the actual industry filings in New Jersey are not in the record below, the insurance companies have brought them into question by seeking to challenge *Broadwell*. Copies of the original filing by the Mutual Insurance Rating Bureau have

to insurance commissioners that the exclusion was intended merely as a clarification of the "occurrence" definition, and that coverage was excluded only for intentional pollution:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.[37]

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been obtained from the New Jersey Department of Insurance and have been attached to this brief. (*See* Appendix, Exhibit J). It is believed that this Court can take judicial notice of these public records. If not, there is ample evidence from which the court can conclude that the language set forth above was submitted in identical form to all state insurance commissioners, including New Jersey's. *See e.g., New Castle County v. Hartford Accident and Indem.*, 933 F.2d 1162, 1198 (setting forth language identical to that quoted above and describing it as "the standard explanatory memorandum submitted to state insurance commissioners"). This Court can take judicial notice that the same language and explanation was filed with insurance commissioners across the Country. *See* N.J. Evid. R. 9(1) and Evid. R. 12; *See also Joy Technologies, supra* (setting forth the identical language in the West Virginia filings).

[37] Of significance herein, the West Virginia Supreme Court recently applied the principles of judicial estoppel for Liberty Mutual from taking positions on the "polluter's exclusion" *identical* to the one's that Liberty is taking in this matter:

> Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the

The first sentence of the IRB and MIRB submission to the state insurance commissioners is false. That first sentence reads:

> law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia *act in a manner consistent* with their *studies, unambiguous, official,* affirmative *representations to the State, its subdivisions, or its regulatory bodies.*
>
> As will hereinafter be discussed, this Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority of the State of West Virginia, prior to the institution of this action, took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position [that the "pollution's exclusion" barred coverage for gradual pollution, even if the injury was unexpected and unintended], and act in a manner, *inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations.* Such, in this Court's view, would be inconsistent with, and *contrary to, the public policy of this state.*

Joy Technologies, supra, slip op. at 10 (emphasis added). Similarly, Liberty Mutual and the other insurance companies that took part in the filings submitted to New Jersey *or* West Virginia should be estopped from taking a position here that is inconsistent with these prior representations made to the commissioners that the "exclusion was a mere clarification of existing coverage. *See N.M. v. J.G.*, 255 *N.J. Super.* 423, 605 *A.*2d 709 (App. Div. 1992); *Stretch v. Watson*, 6 *N.J. Super.* 456, 69 *A.*2d 596 (Ch. Div. 1949) (parties should not be allowed to play "fast and loose" with the courts).

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence.

Clearly, as the drafter, G.L. Bean's own statement's, *supra*, indicate, pollution coverage was provided for prior to 1970.

Even a pro-insurance industry article recognizes that the "occurrence" policy covered gradual pollution losses:[38]

> With the lesson of accident-based coverage fresh in their minds, [in 1966] the insurers *used new language* to remove only the suddenness barrier and *to cover pollution liability that arose from gradual losses.* The standard policy made it clear that the loss had to be unexpected and unintended from the insured's standpoint for coverage to apply.

Rosenkranz at 1247. (footnote omitted, emphasis added.)

* * *

Respectfully submitted,

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/s/ Fred G. Stickell III
FRED G. STICKEL, III

[38] Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237 (1986).

APPENDIX H

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	
Plaintiff-Appellant,	
vs.	
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,	
Defendants-Respondents.	

REPLY BRIEF OF DEFENDANT-RESPONDENTS/ CROSS-APPELLANTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES

* * *

1. The "Regulatory History" Documents Relied On By Thiokol Support The Positions Taken By The Carriers

Thiokol relies on the regulatory filing history discussions in *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991) and *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989),

to support its position that the pollution exclusion is ambiguous. The documents relied on in these cases were submitted by the Insurance Rating Board ("IRB") in connection with the 1970 filing of the pollution exclusion with the various state insurance departments. The IRB submissions contained an explanatory memorandum which was filed in most states. The memorandum provides in relevant part:

> *Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended* and thus are excluded by the definition of occurrence. *The above exclusion clarifies the situation so as to avoid any question of intent.* Coverage is continued for pollution or contamination caused by injuries where the pollution or contamination results from an accident. . . .

New Castle, 933 F.2d at 1198 (emphasis added).

The very first sentence of the explanation confirms the insurers' belief in 1970 that most incidents of pollution were not currently covered by the occurrence policies. It belies Thiokol's claim that the carriers "intended to revolutionize the coverage afforded pollution risks so that the vast majority of pollution claims would for the first time be uninsurable." Pet. Br. at 1. The 1970 submissions were made at a time when liability was imposed only upon a finding of fault and only after a third party had been injured as a result of that fault. Ten years later, CERCLA and comparable state statutes imposing strict liability brought about a flood of pollution claims which

were unforeseen at the time of the filings. Any predictions made in 1970 should be evaluated in light of what was known at the time.

The second sentence of the explanation reinforces the drafters' understanding that the exclusion would result in a change by doing away with the question of intent. The initial focus of the coverage determination would now be on a physical event, the discharge of contaminants, instead of policyholder intent. If that discharge was not sudden, the inquiry could be terminated without venturing into the more complex question of intent.

The final sentence confirms the drafters' intent that the exclusion applies to the classic temporal "accident" which was understood to be a sudden event identifiable in time, such as a "boom" incident. Indeed, the regulatory history documents submitted to Judge Huot by Thiokol indicate that the insurers used the term "accident" to suggest a temporal element. Pa 1710. Thiokol's historical submissions state that in 1966 the IRB expanded the definition of occurrence because of criticism that the use of the term accident alone in the occurrence definition "required suddenness (a boom) as to time and place." *Id.*

The IRB documents submitted to the trial court by Thiokol also demonstrate that the pollution exclusion would effect a reduction in coverage. Indeed, the IRB indicated that on an individual basis policyholders could "buy-back" the coverage which the pollution exclusion eliminated from the policy. Pa 1344, 1716, 1724.

* * *

Broadwell and its progeny, including the recent West Virginia decision, *Joy Technologies*,[9] suggest that the proponents of the pollution exclusion are estopped from giving any real effect to the pollution exclusion because of one construction of certain isolated statements in the memorandum that was submitted in most jurisdictions.

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[9] *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, No. 20153 (W. Va. June 11, 1992), also failed to read carefully the language of the filing documents it relied on in concluding that the pollution exclusion was ambiguous. As in *New Castle*, the court focused solely on the word "clarifies" in the explanatory memorandum and ignored the remainder of the document which stressed that intent would no longer be an issue. Nor is there any indication that the court considered the large quantity of materials in the West Virginia Insurance Commissioner's file which directly contradict any claim that the insurers represented that the exclusion would be meaningless and strongly support the insurers' interpretation of the purpose and effect of the exclusion. *See, e.g., North Pacific Ins. Co. v. United Chrome Prods., Inc.*, No. CV 89-0777 (Or. App. Ct. Sept. 30, 1991) (Ra 2) (IRB document submitted to West Virginia "clearly indicates" intent to exclude pollution). Appellate courts which venture into making determinations on the basis of extrinsic evidence run grave risks of error and basic unfairness.

Dated: June 29, 1992

Respectfully submitted,

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By /s/ Cary Edwards
W. Cary Edwards

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Paul R. Koepff
John L. Altieri, Jr.
Stephen V. Kovarik

APPENDIX I

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Appellant,	:
v.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

BRIEF OF DEFENDANT-RESPONDENTS/CROSS-APPELLANTS AMERICAN HOME ASSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES IN SUPPORT OF *AMICUS* AETNA'S MOTION TO EXPAND THE RECORD BELOW

Because the pollution is clear and unambiguous, our view is that extrinsic evidence is inadmissible to vary the meaning of a contact. *See e.g., Massari v. Accurate Bushing Co.*, 81 N.J. 299, 315 (1951); *Filmlife, Inc. v. Mal "Z" Ena, Inc.*, 251 N.J.Super. 570, 573 (App.Div. 1991) (quoting 3 *CORBIN ON CONTRACTS*, 573 (1960)).

In this case, Thiokol and at least one *amicus* have cited to extrinsic evidence. These references have taken the evidence selectively and out of context. It is the

undersigned insurers position that the Aetna *amicus* brief and the appendices referenced thereto have given the Court a fair and complete picture of the derivation of the pollution exclusion. Should this Court or a lower court in remand wish to consider the issue of extrinsic evidence, the Aetna motion should be granted.

* * *

Dated: July 30, 1992

Respectfully submitted,

By: /s/ John G. McAndrews

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Of Counsel:

MENDES & MOUNT

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APPENDIX J

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,

Defendants-Respondents.

INSURANCE COMPANY OF NORTH AMERICA'S JOINDER IN THE BRIEF OF DEFENDANT-RESPONDENTS/CROSS-APPELLANTS AMERICAN HOME ASSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES IN SUPPORT OF *AMICUS* AETNA'S MOTION TO EXPAND THE RECORD BELOW

Defendant-Respondent/Cross-Appellant Insurance Company of North America respectfully submits this joinder in the Brief of Defendant-Respondents/Cross-Appellants American Home Assurance Company, Underwriter's at Lloyd's London, and London Market Insurance Companies in Support of *Amicus* Aetna's Motion to Expand the Record Below, filed on July 30, 1992. For the reasons set forth therein, Insurance

Company of North America requests that *Amicus* Aetna's motion to expand the record below be granted.

Dated: July 31, 1992

Respectfully submitted,

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APPENDIX K

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,
Plaintiff-Appellant,
vs.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,
Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS/CROSS-APPELLANTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE MOTION BY THE STATE OF NEW JERSEY TO PARTICIPATE AS *AMICUS CURIAE* AND TO EXPAND THE RECORD

* * *

POINT II

THE MOTION TO EXPAND THE RECORD SHOULD BE DENIED SINCE THE EXTRINSIC EVIDENCE OFFERED IS INCOMPLETE AND UNNECESSARY TO INTERPRET THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE POLLUTION EXCLUSION

It is the insurers' position that the question of whether a contract is ambiguous, and the meaning of

unambiguous contracts, including insurance policies, must be determined from only the four corners of the contract. As noted in the insurers' opening brief and reply brief, it is improper and unnecessary to look at any extrinsic evidence to interpret a policy which can be understood by looking only at the policy itself. Since the phrase "sudden and accidental" in the context of the pollution exclusion is clear and unambiguous, the extrinsic evidence offered by the State is unnecessary to interpret the plain language of the exclusion.

A second basis for denying the State's motion to expand the record is that there is no proffer by the Attorney General that the documents offered represent the entire files maintained by the Insurance Department in connection with the regulatory materials. Incomplete or select portions of the Insurance Department's files will not provide an accurate picture of what the Department understood about the effect of the pollution exclusion. A cursory review suggests that the files are incomplete. For example, document numbers 31, 32 and 33 state that the Insurance Department requested a legal opinion, presumably from the Attorney General's office, before approving the pollution exclusion. The legal opinion is not among the documents offered by the State.

Finally, it is far too late in the day to be introducing new evidence. Simply admitting the documents as evidence will not resolve what their drafters intended or what the drafters of the pollution exclusion intended. The State's motion suggests that it intends to provide the Court with its interpretation of these documents. Even if extrinsic evidence were admissible, it is fundamentally unfair to let one side put its own gloss on the documents without allowing the other side an adequate opportunity

to challenge that interpretation in its briefs and, where appropriate, by taking testimony of the authors and recipients. This Court is not a trial court and it should not be lulled into becoming a finder of hotly contested factual issues that were never considered by the trial court, *i.e.* what particular documents mean.

This Court should not make a decision based on an incomplete or one-sided record. A court which resorts to extrinsic evidence should do so on a complete record fairly contested by the parties. Even where it is relevant and admissible, extrinsic evidence should not be considered unless all parties to the action have a full and fair opportunity to present and develop favorable evidence and rebut non-favorable evidence. That is why it is doubly unfair to admit extrinsic documentary evidence directly into an appellate record and to do so after the close of briefing by the parties.

* * *

Dated: September 14, 1992

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SUPREME COURT OF NEW JERSEY

MORTON INTERNATIONAL, INC., *etc.*,

Plaintiff-appellant

vs

GENERAL ACCIDENT INSURANCE COMPANY, *et al.*,

Defendant-Respondents

DOCKET NO. 34,341

BRIEF ON BEHALF OF DEFENDANTS LONDON MARKET IN OPPOSITION TO MOTION BY STATE OF NEW JERSEY TO APPEAR *AMICUS CURIAE* AND TO SUPPLEMENT THE RECORD

POINT II

NO GROUND FOR SUPPLEMENTING THE RECORD HAS BEEN DEMONSTRATED BY MOVANT-AMICUS ATTORNEY GENERAL OF THE STATE OF NEW JERSEY.

In his motion for leave to appear as *amicus curiae*, the Attorney General of the State of New Jersey has also moved to supplement the record. This motion is the height of procedural hubris, and should be denied.

* * *

Respectfully submitted,

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BY: /s/ Robert J. Kovacs
ROBERT J. KOVACS

MENDES & MOUNT

BY: /s/ Kathleen B. Browne/DTK
KATHLEEN B. BROWNE
Attorneys for defendants
London Market

DATED: September 14, 1992

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant.

vs.

GENERAL ACCIDENT INSURANCE COMPANY, et al

Defendants-Respondents.

BRIEF OF DEFENDANTS AFFILIATED FM INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA AND CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO THE MOTION BY THE STATE OF NEW JERSEY TO APPEAR *AMICUS CURIAE* AND TO EXPAND THE RECORD

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* * *

Plaintiff further argues to the Court that Aetna should be denied leave to expand the record since the new information proffered is incompetent and irrelevant. . . . Defendants likewise contend that the materials sought to be introduced by the State are irrelevant to the issues on appeal.

* * *

Respectfully submitted,

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By: /s/ Daniel P. Caswell
Daniel P. Caswell

Dated: September 14, 1992

APPENDIX L

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL INC.,

Plaintiff-Appellant,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY

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* * *

POINT III

THE INSURERS ARE BOUND BY THE EXPLANATION OF THE POLLUTION EXCLUSION CLAUSE THEY PROVIDED TO THE NEW JERSEY DEPARTMENT OF INSURANCE AND UPON WHICH THE DEPARTMENT RELIED TO APPROVE THE EXCLUSION.

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* * *

Based upon these respective submissions the Commissioner of Insurance approved both the changes. The arguments of the insurers would, at least in the area of pollution insurance, reinsert a temporal requirement into the concept of an accident and refocus the inquiry on the intent to do the causative act rather than the intent to

cause the injury. The explanatory paragraph they submitted gives no hint that the insurers intended to step backward to the pre-1966 era when these issues were extensively litigated.

The Appellate Division found persuasive authority that the contemporaneous purpose of the pollution exclusion was to clarify the exclusion of coverage for the intentional polluter. *Broadwell Realty,* 218 *N.J. Super.* at 533-534. Regardless of the insurers' unspoken intent at the time they submitted this language, all the New Jersey Commissioner of Insurance had before him was the insurers' explanatory paragraph.

It would eviscerate the purposes of the ratemaking act to allow insurers to make a representation to the Department of Insurance that an exclusion leaves coverage unchanged and later receive the benefit of an interpretation that significantly reduces the risks covered.

* * *

Respectfully submitted,

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By: /s/ Karen L. Jordan
Karen L. Jordan
Deputy Attorney General

Dated: 10/25/92

APPENDIX M

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,

Defendants-Respondents.

BRIEF IN ANSWER TO *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

PRELIMINARY STATEMENT

This brief is submitted on behalf of the undersigned insurers in reply to the Brief *amicus curiae* of the State of New Jersey. Notwithstanding that the Court did not grant the Attorney General's motion to expand the record on appeal, the State filed a supplemental appendix containing 115 pages of extra record, so called extrinsic evidence (selectively chosen by the State) allegedly relating to the regulatory history of the pollution exclusion and the 1966 CGL policy forms. The State's brief, in turn, relies upon

its interpretation of those handpicked documents which were never before either of the courts below.

The Court should reject the State's offer of extrinsic evidence and its arguments which rely on that evidence. The meaning of the pollution exclusion can and should be derived from the four corners of the insurance policies. It is both unnecessary and inappropriate to expand the record with such selectively chosen extrinsic evidence. Use of this extrinsic evidence was not permitted by the trial court. It would be grossly unfair to do so at this late stage, especially when this is being done in the last brief submitted at the highest level of appellate review. Even if it were relevant and admissible, the extrinsic evidence selected by the State cannot fairly be received after appellate briefing is concluded and the parties are foreclosed from offering their own evidence. Even if the Court were to conclude that resort to extrinsic evidence is required, the matter should be remanded for an evidentiary hearing where all parties have a fair shot at offering evidence. *See* Point I, Section A, *infra*.

* * *

Dated: November 12, 1992

RONCA, MCDONALD & HANLEY

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MENDES & MOUNT

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By /s/ Cary Edwards
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APPENDIX N

ARCHER & GREINER

December 30, 1992

Gail G. Haney, Deputy Clerk
New Jersey Supreme Court
Hughes Justice Complex, CN 970
Trenton, New Jersey 08625

Re: Morton International, Inc. v. General Accident Insurance Company of America
Docket No. 34, 341
Our File No. MOR-072-814

Dear Ms. Haney:

In connection with the above-captioned matter, this will confirm your telephone request yesterday for provision of the following documents cited in the appendices of the respective parties which I enclose copies of herewith:

1. Harwood & Zampino, *The Emporer's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence,* 6 Mealey's Insurance Litigation Reports No. 25 (Part One) (May 5, 1992) and 6 Mealey's Insurance Litigation Reports No. 26 (Part Two) (May 12, 1992)

2. Harwood & Zampino, *The Occurrence Definition And Extrinsic Evidence: The Diogenesian Search For The Reasonable Man,* 6 Mealey's Insurance Litigation Reports No. 31 (June 16, 1992)

3. Harwood & Zampino, *The West Virginia Regulatory Filings And Extrinsic Evidence Of The "History" Of The Pollution Exclusion,* 6

Mealey's Insurance Litigation Reports No. 47 (October 20, 1992)

4. Sayler, *The Dutch Boys At The Dike: The Apologists For The Polluter's Exclusion Run Out of Fingers*, 6 Mealey's Insurance Litigation Reports No. 32 (June 23, 1992)

5. Harwood & Zampino, *The "Frivolity" of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Insurance Litigation Reports No. 40 (August 27, 1991)

6. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat: The Insurers' Last Word On The Pollution Exclusion*, 5 Mealey's Insurance Litigation Reports No. 46 (October 8, 1991)

7. Sayler & Zolensky, *Pollution Coverage and The Intent Of The CGL Drafters: The Effect Of Living Backwards*, 1 Mealey's Insurance Litigation Reports No. 57 (June 9, 1987)

By copy of this letter, I am advising all counsel of the Court's request for the production and our provision of the above-referenced materials.

Very truly yours,

ARCHER & GREINER
A Professional Corporation

By: /s/ Ellis I. Medoway
ELLIS I. MEDOWAY

HARWOOD LLOYD

January 15, 1993

HAND DELIVERED

Gail Haney, Deputy Clerk
Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, NJ 08625

Re: Morton International v. General Accident

Dear Ms. Haney:

Thank you for calling on Friday, January 15, 1993. As you requested, enclosed please find copies of an article and a commentary from Mealey's Litigation Reports – Insurance. The article, entitled "Special Report: Pollution Exclusion Dissected in Hartford," was published on February 27, 1990 in Volume 4, Issue No. 8. The commentary, entitled "Insured Counsel Doubletalk: The Fallacies In Anderson And Passannante's Arguments Concerning The Interpretation of 'Sudden and Accidental' In Boiler And Machinery Policies," and written by James Johnstone and Frederick Ansell, was published on January 15, 1991, in Volume 5, Issue No. 10.

We are delivering this correspondence to Justice Stein's chambers, as you instructed, and will copy all counsel on this cover letter. If we can be of further assistance, please do not hesitate to call again. Thank you.

Very truly yours,

/s/ Brian R. Ade
BRIAN R. ADE

APPENDIX O

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Appellant,	:
vs.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

PLEASE TAKE NOTICE that the undersigned insurers respectfully move the Court, pursuant to R. 2:11-6, for reconsideration of its July 21, 1993 decision in this matter. In support of the motion, movants will rely upon the accompanying Brief In Support Of Motion For Reconsideration and appendix thereto.

On July 26, 1993, the carriers moved for an order granting a thirty day enlargement of time to file a motion for reconsideration. That motion was orally granted by Justice Handler on July 30, 1993.

BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION

* * *

A. The Carriers Were Deprived Of Their Due Process Right To A Fair Evidentiary Hearing

The Court denied the insurers their Fourteenth Amendment rights to due process when it estopped the entire insurance industry from relying on the "literal terms" of the pollution exclusion without the opportunity to present a fully developed factual record and to rebut the evidence upon which the Court relied.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In *Fuentes*, the Supreme Court noted:

> [W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Id. at 81. The fundamental due process right to a hearing embraces the right to present evidence and to confront and to cross-examine adverse evidence. *Green v. McElroy*, 360 U.S. 474, 497 (1959).

> Certain principles have remained relatively immutable in our jurisprudence. . . . We have formalized these protections in the requirements of confrontation and cross-examination . . . This Court has been zealous to protect these rights from erosion . . . It has spoken out not only in criminal cases [cites omitted] . . . but also in all

> types of cases where administrative and regulatory actions were under scrutiny.

Id. at 496-97. The due process values embodied in Article I, paragraph 1 of the New Jersey Constitution require no less. *Ledezna v. A&C Drywall,* 254 N.J. Super. 613, 618 (App. Div. 1992).

Saunders v. Shaw, 244 U.S. 317 (1917), is directly on point with the facts of the present case. In *Saunders,* the Supreme Court reversed a decision by the Louisiana Supreme Court because the state's highest court had unconstitutionally denied a request for an evidentiary hearing on whether a parcel of property was subject to a tax assessment. *Id.* at 319. The state court had denied a hearing because it believed that the legality of the assessment "was so plain on the uncontroverted facts [and] . . . to remand [the case] would be an empty form – a mere concession to technicality." *Id.* Justice Holmes highlighted the constitutional infirmity in the state court's reasoning:

> It *may* turn out so, but we do not see in the record an *absolute warrant* for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Id. (emphasis added).

As shown above, this Court erroneously assumed that the record contained all important evidence regarding the regulatory history of the pollution exclusion. The Court's determination that it would be "redundant" to remand the case for an evidentiary hearing violated the insurers' due process rights under the Fourteenth

Amendment. *See Fuentes*, 407 U.S. at 90, n.22 ("A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. . . . But these rather ordinary costs cannot outweigh the constitutional right"); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971) ("Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process").

* * *

Dated: August 30, 1993

MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI

Of Counsel:
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Attorneys for Defendant-Respondent General Accident Insurance Company of America

Respectfully submitted,

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APPENDIX P

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY ON MOTIONS FOR RECONSIDERATION

ARGUMENT

POINT I

AN INQUIRY INTO THE MENTAL PROCESSES OF THE REGULATORS WOULD BE INCONCLUSIVE AT BEST DUE TO THE UNAVAILABILITY OF KEY DECISION-MAKERS AND THE PASSAGE OF TIME

* * *

The recommendation to approve the exclusion came from Rate Analyst William J. Gough and the Rating Division Chief Charles L. Maier. Sa112*. One of these two

---

*The Appendix submitted by the State of New Jersey and accepted by this Court as part of the record in its July 21, 1993 order will be cited as Sa, followed by the page number.

individuals signed all of the correspondence in the Department of Insurance file relative to the pollution exclusion submitted by the State of New Jersey with its brief on October 28, 1992. Sa92-Sa116. Mr. Gough and Mr. Maier were also responsible for the bulk of the memoranda and correspondence in the documents submitted by *amicus curiae* New Jersey State League of Municipalities on or about November 25, 1992 with the Certification of David Garfield Roland (Roland Certification) stating he had found these documents in Department of Insurance files at an earlier date. The only items that were signed by others were the half page memorandum by Jerome Steen (Exhibit D), the memorandum of Walter R. Davis Jr. (Exhibit M) and the order by W. Morgan Shumake approving the pollution exclusion. (Exhibit P). If the Commissioner delegated the evaluation of the pollution exclusion to anyone, he delegated it to Mr. Maier and Mr. Gough, based on the recommendation endorsed by these two individuals. Sa112. The record suggests then-Commissioner Clifford had minimal involvement in the review and approval of the exclusion.

Mr. Maier and Mr. Gough are deceased so they are unavailable to testify to their thoughts leading to their recommendation to approve the pollution exclusion. Mr. Shumake is also deceased. Without their testimony, any inquiry into what the regulators were thinking in 1971, to counter the misleading explanation by the insurers, would be, at best, inconclusive. At worst, Mr. Steen's speculations twenty-three years later, as to what Mr. Maier and Mr. Gough were thinking, would become the

sole basis for overturning this Court's well considered, thorough opinion.*

* * *

Respectfully,

FRED DeVESA
ACTING ATTORNEY GENERAL
OF NEW JERSEY

By: /s/ Karen L. Jordan
Karen L. Jordan
Deputy Attorney General

Dated:
[December 15, 1993]

*Mr. Davis is still living, though no longer employed by the Department of Insurance. Any testimony he could give would be subject to the same limitations as he was not a decisionmaker.

MOTION FILED
JUN 13 1994

(6)

No. 93-1797

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,
v.
MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

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June 13, 1994

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IN THE

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OCTOBER TERM, 1993

No. 93-1797

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Insurance Environmental Litigation Association ("IELA"), by its undersigned attorneys, hereby moves the Court for leave, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, to appear as *amicus curiae* in support of the Petition for a Writ of *Certiorari*. IELA is an association of major property and casualty insurers which, since 1986, has participated as *amicus curiae* in more than 260 cases in nearly seventy state and federal courts addressing environmentally related insurance coverage cases. This is IELA's first filing in support of *certiorari*.

IELA's motion and the accompanying conditionally filed brief are submitted within the time specified by Rule 37.2. The written consent of all the petitioners, as well as of respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company accom-

panies this motion and the proposed brief. Respondent Morton International, Inc. has refused to consent to the filing of the proposed brief.

This case jeopardizes the health of the domestic and worldwide insurance and reinsurance markets. The payment of literally hundreds of millions of dollars turns on the New Jersey court's decision in *Morton*—a decision reached in a manner that utterly deprived the insurer parties of their due process rights under the United States Constitution. The decision will also have immense consequences for future insureds who will bear the financial burden of the liability coverage created by the procedurally flawed *Morton* decision. Insurers and reinsurers who never agreed to cover the risks imposed by *Morton* will be forced to devote funds covering other risks to pay what amounts to a pollution tax decreed by the New Jersey court in an adjudication devoid of procedural safeguards.

The effect of *Morton* also is to deprive the petitioners and each of IELA's members of their contractual property rights without due process. The *Morton* court denied the party insurers notice and an opportunity to be heard on the "regulatory estoppel" issue upon which the decision turned—an issue that arose only when the court raised it *sua sponte* in its decision on the merits. Through this blatant denial of the most fundamental due process protections, the *Morton* court deprived insurers of valuable property and contract rights by taking from them the right to rely upon and enforce an insurance policy provision precluding liability coverage for harms caused by gradual pollution discharges.

IELA members, most of whom have regularly used the pollution exclusion clause at issue here in New Jersey and throughout the nation, are painfully aware that the petition before the Court involves a dispute of huge proportions. More than $100 billion is at stake in the debate

over the application of the pollution exclusion at issue, and this case is a key component in the $480 billion to $1 trillion controversy about who will pay to clean up America. The preservation of the due process rights guaranteed to all civil litigants is now very much at risk in the nationwide struggle over insurance coverage for environmental harms given the decision below.

As an association representing most of the nation's major property and casualty insurers,* IELA is uniquely positioned to demonstrate to the Court how failure to overturn *Morton* would countenance a serious violation of due process and could have a dramatic adverse effect on insurers worldwide.

WHEREFORE, the Insurance Environmental Litigation Association respectfully requests that this Court grant its motion for leave to file an *amicus curiae* brief in support of the Petition for a Writ of *Certiorari*.

---

* IELA submits this motion and proposed brief on behalf of IELA members Aetna Life and Casualty Company, Allstate Insurance Company, Chubb Group of Insurance Companies, Continental Insurance Company, Crum & Forster Corporation, Fireman's Fund Insurance Companies, Hanover Insurance Company, Home Insurance Company, Maryland Insurance Group, Prudential Reinsurance Company, Royal Insurance Company, St. Paul Companies, Selective Insurance Group of America, State Farm Fire & Casualty Company, The Travelers Insurance Companies, United States Fidelity & Guaranty Company, and Zurich-American Insurance Group. IELA member Liberty Mutual Insurance Company and affiliates of IELA members American International Group, CIGNA Property and Casualty Companies, and Hartford Insurance Group are petitioners; accordingly, this motion and proposed brief are not submitted on their behalf. Petitioners Continental Casualty Company and General Accident Insurance Company of America and respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company are not members of IELA.

Respectfully submitted,

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June 13, 1994

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BRIEF *AMICUS CURIAE* OF THE INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

Amicus Curiae The Insurance Environmental Litigation Association ("IELA") hereby supports the petition for a writ of *certiorari* to review the judgment of the Supreme Court of New Jersey in this case.

INTEREST OF THE *AMICUS CURIAE*

This case is crucial to IELA's members. It deprives them of their contractual property rights without due process, and jeopardizes the health of the domestic and worldwide insurance and reinsurance markets. IELA is an association of major property-casualty insurers which, since 1986, has participated as *amicus curiae* in more than 260 cases addressing environmentally related insurance coverage cases. The importance of this case prompts IELA to make its first filing in support of *certiorari*.[1]

Most IELA members have regularly used the pollution exclusion at issue here throughout the nation. More than $100 billion is at stake in the debate over the exclusion's application,[2] and this case is a key component in the $480 billion to $1 trillion controversy about who will pay to clean up America. While state courts interpret the pollution exclusion in hundreds of cases nationwide, the preservation of the core requisites of due process is plainly within the province of this Court. IELA believes it is uniquely positioned to demonstrate to the Court how

---

[1] For a list of IELA members on whose behalf this brief is filed, *see* the attached Motion for Leave to File Brief *Amicus Curiae*.

[2] The definition of the words "sudden and accidental," especially "sudden," has been said to be a $100 billion question. Gary Spencer, *Pollution Coverage Suit Reinstated Against Insurer*, N.Y.L.J., Nov. 15, 1989, at 1.

failure to overturn *Morton* would countenance a serious violation of due process and could dramatically, adversely, and improperly affect insurers worldwide.

SUMMARY OF THE ARGUMENT

The decision below is not a conventional contractual adjudication between an insurer and its policyholder. Here, a state supreme court acknowledged that the contracts at issue exclude coverage for pollution damage. Nonetheless, the court imposed vast pollution liability upon all insurers doing business in New Jersey, "finding," without notice, hearing, or evidence, that the "insurance industry" somehow misrepresented the impact of the admittedly "plain and unambiguous" pollution exclusion to expert state insurance regulators who consequently approved the exclusion without an appropriate rate adjustment. This perplexing, fact-bound conclusion was reached, *sua sponte*, only at the second level of appellate review, and the petitioners were denied any opportunity for factual refutation. Indeed, the New Jersey court based its "fact-finding" primarily on articles written by lawyers who represent large industrial companies like respondent Morton International, Inc. ("Morton") in disputes with insurers.

Insurance cannot operate with economic rationality if courts disregard policy limitations and grant insurance coverage *ex post facto*. As the California Supreme Court has noted, judicially created insurance leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 711 (Cal. 1989). Here, the erroneous expansion was both huge and unanticipated and could severely and adversely affect the price and availability of insurance for millions of Americans.

Critically, these harmful consequences would result from a state court proceeding that afforded the petitioners

not one *scintilla* of due process protection. Like criminal defendants, government employees, and other property owners, insurers should have the right, disregarded here, to present their evidence and to test their adversaries' evidence in an impartial hearing before they are faced with negative legal consequences. Without an evidentiary hearing, the court estopped the entire "insurance industry" from enforcing the exclusion at issue. Its refusal to consider the circumstances of the individual litigants, some of whom had no connection at all with the alleged misrepresentations, highlights its desire to achieve a legislative redistribution of funds without the even-handed adjudication mandated by the Fourteenth Amendment.

This Court has long held that "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) (Brandeis, J.). Here, the New Jersey court, after conceding that the pollution exclusion gives rise to a valuable property right, has nonetheless deprived *all* insurers of "existing remedies" for enforcing that right. And, in contravention of the Fourteenth Amendment, the court has done so without affording insurers any "real opportunity" to protect that valuable property right.

New Jersey would receive a parochial benefit under *Morton* for use in remedying the state's pervasive environmental problems. But the national and international costs of the New Jersey Supreme Court's approach are severe: insurers and reinsurers that never agreed to cover damages from gradual pollution and, consequently, never collected premiums for such risks, will be forced to use funds supporting other risks to pay a state pollution tax not sanctioned by the legislature or tested by due process adjudication. Accordingly, this case plainly merits a grant of *certiorari*.

REASONS FOR GRANTING THE WRIT

I. *MORTON* THREATENS SERIOUS HARM TO THE DOMESTIC AND WORLDWIDE INSURANCE AND REINSURANCE MARKETS.

The New Jersey court's decision to override the plain terms of the insurance contracts could, if not reversed, financially impair insurers here and abroad. The enormous costs of cleaning up all hazardous waste sites substantially exceed the total reserves of all insurers. *Morton* suggests that the supposedly "deep pocket" of insurers should be picked by "equitable" sleight-of-hand notwithstanding clear contractual limitations on insurance coverage. If this tempting rationale is extended to the hundreds of cases nationwide involving the pollution exclusion at issue, insurers will be stuck with massive unfunded—and potentially unfundable—liabilities.

A. Shifting The Huge Costs Of Environmental Cleanup To Insurers As *Morton* Proposes Could Endanger The Insurance Mechanism.

The nationwide costs of environmental cleanup, imposed retroactively under a variety of state and federal environmental statutes,[3] are so enormous that insurers could not possibly bear them even if they had agreed to cover risks of this type. But where they did not agree to cover, or charge premiums for, the risks that the decision below would force them to bear, the monumental economic impact is intolerable.

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[3] Among these statutes are the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1988 & Supp. IV 1992) ("CERCLA"), which includes the Superfund program; state statutes that resemble CERCLA, and other applicable federal and state statutes, such as the New Jersey Industrial Site Remediation Act, 1993 N.J. Laws ch. 139. Private rights of action have also become the basis for huge environmental cleanup liabilities. The dispute in *Morton* arises under the New Jersey Spill Compensation and Control Act of 1976, N.J.S.A. §§ 58:10-23.11 to -23.24 (1992) ("Spill Act").

1. *The Threat* Morton *Poses to Domestic Insurers.*

Morton has the potential economic force of one hundred hurricanes. Hurricane Andrew was "by far the most expensive catastrophe ever for insurers in the United States." [4] Yet Andrew's total covered loss of $7.3 billion is dwarfed by the cost of cleaning up the nation's hazardous waste sites—estimated to be between $480 billion and $1 trillion.[5] By contrast, insurers' surplus to secure *all* risks, not just environmental ones, is estimated at $157 billion—less than one-third the most conservative estimate of the cost of remediating America's waste problem.[6] Although Congress is now considering reform of the Superfund program,[7] such reform would not eliminate the threat to insurers posed by *Morton*. Even if enacted, it would leave untouched a myriad of other federal and state environmental enforcement mechanisms, such as the New Jersey Spill Act under which the environmental liabilities in *Morton* arose.

Insurers assume certain risks defined by their policies in return for premiums. Premiums are calculated by equalizing the predictable, but unpredictably distributed,

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[4] Peter Kerr, "Insurers' Florida Tab: $7.3 Billion," New York Times, Sept. 2, 1992, at D1.

[5] Milton Russell, E. William Colgazier, & Mary R. English, *Hazardous Waste Remediation: The Task Ahead*, University of Tennessee Waste Management Research and Education Institute 15-16 (Dec. 1991).

[6] *See, e.g.*, Christopher Dauer, *Pollution Liability Threatens Solvency*, National Underwriter, Aug. 24, 1992, at 1, 20 (comparing the $700 billion to $1 trillion in costs to domestic insurers' $157 billion surplus); *Insurer Liability for Cleanup Costs at Hazardous Waste Sites: Hearing Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 50 (1990) (GAO statement that the projected cost of CERCLA alone is as much as five times the total surplus of U.S. property-casualty insurers).

[7] *See* H.R. 3800, "Superfund Reform Act of 1994," 103d Cong., 2d Sess. (1994).

costs of covered occurrences incurred by the policyholders within the risk pool. Through actuarial science, insurers are able to respond to the random catastrophes that strike individuals precisely because, on a large scale, the frequency of such events becomes reasonably predictable.[8]

In order to spread risks rationally, insurers must set contractual boundaries on their overall coverage obligations.[9] When those boundaries are ignored *ex post facto*, insurers bear liabilities for which they have collected no premiums and established no reserves. Under favorable market conditions, where all insurers are affected, these liabilities may be shifted partially to future policyholders. But even given this best-case assumption, imposition of massive gradual pollution cleanup liability under *Morton* would invade the insurer surplus substantially and grossly distort the insurance mechanism. And, in any event, *Morton* will force policyholders nationwide to subsidize New Jersey's cleanup efforts.

Also, while reinsurance practices are designed to ameliorate insurers' risks, *Morton* in fact aggregates the beneficial function of reinsurance. Reinsurers also rely on the meaning of the underlying insurance contract to estimate the risks they will undertake and to set the premiums charged to insurers. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2915 (1993) ("[T]he scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured."). Retroactive expansion of policy coverage, whether by a court or by a legislature, undercuts these calculations. Thus, reinsurance participation redistributes but does not lessen the pain of *Morton*-like decisions.

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[8] *See generally* Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 1.3(b), at 12-13 (West 1988).

[9] *See, e.g.*, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 Colum. L. Rev. 1849, 1860-61 (1988).

2. *The Threat* Morton *Poses to Foreign Insurers.*

The effect of expansive United States liability and coverage decisions on British and other foreign insurers and reinsurers has been well-documented.[10] Much of Lloyd's of London now teeters on the brink of bankruptcy, in part because of insurance coverage created by courts in the United States to pay environmental cleanup costs.[11]

Under the circumstances, some foreign insurers understandably view decisions like *Morton* as a form of expropriation by American courts under the false color of contract adjudication. Whether as insurers or as reinsurers, these carriers have entered into contracts that plainly and unambiguously preclude coverage for environmental claims, other than those arising from a "sudden and accidental" discharge. These terms, as *Morton* agreed, "virtually eliminate[] pollution-caused property-damage . . . coverage" except for the classic "accident" or "boom" event. Ptr. App. 36a.

When presented with Morton's gradual pollution claims, its insurers properly denied coverage based on this policy language. They were then called upon to defend their decision in a court in New Jersey, the nation's most polluted state.[12] They defended the denial of coverage by

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[10] *See* Brief of Respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies, and Affiliated FM Insurance Company in Support of Petition for a Writ of *Certiorari* 1-4 (May 27, 1994).

[11] *See, e.g.*, Richard Lapper, *Business and the Environment: Stuck with the Bill—Europe's Insurers Could Learn from US Experience*, Financial Times, May 6, 1992, at 14 (Lloyd's faces "potentially crippling losses" if United States courts continue to interpret policy language so as to order insurers to pay to clean up polluted sites).

[12] New Jersey is the state with the most hazardous waste sites on EPA's National Priority List for the Superfund program, with almost ten percent of the national total. EPA, National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 8,724, 8,729 (Feb. 23, 1994).

pointing to, among other things, the six state supreme courts [13] and numerous state intermediate appellate courts [14] and federal courts of appeals [15] that have read the word "sudden" in the pollution exclusion as necessarily referring to an event that occurs quickly, hastily, immediately, or abruptly.

The New Jersey Supreme Court agreed that the exclusion's language plainly warranted denial. Nonetheless, the court estopped the entire "insurance industry" from relying on the exclusion to deny coverage for unintentional gradual pollution, Ptr. App. 86a-92a, based on a determination that the expert state insurance regulators who approved this unquestionably clear exclusion in 1970 were somehow fooled about what it meant. Ptr. App. 51a.[16] The court proposed and adopted this novel "regulatory estoppel" theory *sua sponte*. Also, without permitting the petitioners to create an evidentiary record in rebuttal, *Morton* relied on the characterization of selected documents in articles written by counsel who regularly represent policyholders in insurance coverage litigation. It then labelled these articles "independent commentary" and determined that a hearing was unnecessary.[17] What

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[13] These include the highest courts in Florida, Massachusetts, Michigan, New York, North Carolina, and Ohio.

[14] These include courts in California, Indiana, Iowa, Kansas, Maryland, Minnesota, Oregon, Pennsylvania, and Utah.

[15] These include the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits.

[16] On rehearing, the petitioners submitted affidavits from former state insurance regulators contradicting these "findings." *See* Pet. 24-29; Ptr. App. 51a, 232a-248a. Because the regulatory estoppel theory was raised *sua sponte*, late in the litigation, the *Morton* court could not consider these affidavits.

[17] Ptr. App. 35a ("[W]e are persuaded that a remand would be redundant, and that this record together with the reported cases that address the regulatory history and the abundant independent

is worse, New Jersey courts are now extending the scope of this ruling, by applying it to non-New Jersey cases. *See Continental Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027, 1040 (D.N.J. 1993) (applying *Morton* where the dispute had only a tenuous connection to New Jersey, based on a choice-of-law analysis elevating New Jersey's policy interest of favoring policyholders over another state's interest in "[i]nterpreting insurance contracts to mean what they say.").

At a minimum, such extraordinary procedures fail to inspire confidence in the fairness of American courts.[18] This Court's review is needed to restore the faith of insurers, foreign and domestic, that the United States will not tolerate potentially expropriatory state actions without assurance by this Court of compliance with due process requirements.

B. The Value Of Insurance Contracts Nationwide Is At Risk If Insurers May Be Deprived Without Due Process Of The Benefit Of Regulatory Approved Exclusions.

Spurred on by *Morton*, policyholders are now seeking to extend the "regulatory estoppel" theory to other states

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commentary on the subject affords an accurate and comprehensive basis for our determination.").

To illustrate, among the articles the *Morton* court relied on were Robert D. Chesler *et al.*, *Patterns of Judicial Interpretations of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986), and George Pendygraft *et al.*, *Who Pays For Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 Ind. L. Rev. 117 (1988). Each of these articles, like others the court cited, states clearly that its author "regularly represents policyholders in coverage disputes." *Cf.* Ptr. App. 36a-52a.

[18] The Court has recognized that adhering to the requirements of due process is especially important when dealing with foreign entities. *See, e.g., Asahi Metals Industry Co. v. Superior Court*, 480 U.S. 102, 115-16 (1987).

and even other policy provisions.[19] Although their success has thus far been limited, some courts are sorely tempted to grasp at any theory or truncated procedure that might finance pollution remediation in their proverbial backyard.

The Louisiana Supreme Court's recent decision in *South Central Bell Telephone Co. v. Ka-Ton Food Stores*, No. 93-CC-2926, 1994 WL 201749 (La. May 24, 1994), illustrates the potentially far-reaching effects of the *Morton* "estoppel" rationale.[20] That case addressed a pollution exclusion providing that

> this policy does not apply . . . to any . . . property damage arising out of the actual, alleged or threatened discharge, dispersal, spill, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials . . . or other irritants, contaminants or pollutants . . . at or from premises owned, rented or occupied by the named insured.

Id. at *1, *3. This provision was drafted in 1985 to make absolutely certain that all damages arising from pollution were excluded from coverage. *Id.* at *7 ("The 'absolute' exclusions eliminated the 'sudden and accidental' exception to the exclusion, and clearly stated that environmental cleanup expenses were not covered damages."). Louisiana's state insurance regulators, like those of almost every other state, approved the new exclusion.

Acknowledging that the absolute exclusion is "clear and explicit," *id.* at *7, the Louisiana court refused to enforce it literally based on "equitable considerations."

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[19] *See* Pet. 13 & n.17; *see, e.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, No. 93-1721 (1st Cir.); *Downtown Airpark, Inc. v. Continental Ins. Co.*, No. 93-6144 (10th Cir.).

[20] The Supreme Court of Pennsylvania recently agreed to hear a case presenting the issue whether insurers should be allowed to "enforc[e] a policy exclusion in a manner different than was represented to gain approval for the exclusion's use." *Central Dauphin Sch. Dist. v. Pennsylvania Mfrs'. Ass'n Ins. Co.*, No. 552 M.D. Alloc. Dkt. 1993, 1994 Pa. LEXIS 155 (Pa. May 16, 1994) (per curiam).

Id. at *9. Citing *Morton*, and similarly injecting on appeal *sua sponte* an estoppel issue, the Louisiana court held that the insurer's right to enforce the exclusion would depend on its historic disclosure and premium adjustment practices, regardless of compliance with Louisiana regulatory requirements. *Id.* at *10.

Thus, under *Morton* and its misguided progeny, the insurer always loses. If policy language does not unequivocally preclude coverage, coverage is premised on "ambiguity." If the policy plainly does preclude coverage—as in *Morton* and in *Ka-Jon*—then insurers are "estopped" from achieving this disfavored result. The finality of the regulatory process is swept aside; judgment lies against insurers simply because they are labelled "bad actors." Review by this Court of *Morton* is needed to ensure that courts do not proceed without due process, many years after the fact, to deprive insurers of the benefit of their clearly drafted exclusions.[21]

II. THE WAY THE *MORTON* COURT ARRIVED AT ITS "REGULATORY ESTOPPEL" RULE VIOLATED FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

Reasoned adjudication requires, at a minimum, that courts afford litigants an opportunity to present evidence to the adjudicator, who bases the ultimate factual decision on that evidence alone. In addition, due process in contract cases compels courts to determine disputes under the agreement between the parties, and not to undertake a broad reordering of private resources.

Even beyond its massive financial consequences, review of this case is warranted. First, the New Jersey Supreme

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[21] The insurer-always-pays rationale embodied by *Morton* also directly conflicts with Congress's judgment, embodied in section 107(e) of CERCLA, 42 U.S.C. § 9607(e), to preserve the agreements of private parties to insure, to hold harmless, or to indemnify one another in connection with environmental liabilities arising out of CERCLA. *See generally Mardan Corp. v. CGC Music, Inc.*, 804 F.2d 1454, 1458-59 (9th Cir. 1986).

Court disregarded due process, denying the petitioners notice and an opportunity to be heard. Second, *Morton* did not simply adjudicate the contract dispute before it. Instead, *Morton* redistributes immense sums from insurers that did not accept (and did not collect premiums for) certain risks to entities saddled with the huge costs of remediating soil and water contamination. *Morton*'s result —confiscation, without due process, of valuable vested property rights—is not a legitimate exercise of state judicial power.

A. *Morton*'s Disregard Of The Petitioners' Due Process Rights And Its Purported Application Of A Rule To The Entire "Insurance Industry" Reveal That It Was Not Acting In A Manner Appropriate To A Court.

Insurance policies, "being contracts, are property and create vested rights." *Lynch v. United States*, 292 U.S. 571, 577 (1934) (Brandeis, J.). Insurers may not be divested of these rights without due process of law. Here, without notice, hearing, or evidentiary record, the New Jersey Supreme Court estopped the entire "insurance industry" from enforcing what the court acknowledged was the plain meaning of a very valuable, State-approved, policy exclusion. Moreover, treating the entire "industry" as a monolithic entity, and refusing to consider the varying facts and circumstances of individual insurers and their relationships with their policyholders, highlight the illegitimacy of the *Morton* court's actions.

1. *In Arriving at its Regulatory Estoppel Theory, the Morton Court Wrongly Denied the Petitioners Notice and an Opportunity to be Heard.*

This Court has long held that " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' " *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "While 'many controversies have raged about . . . the Due Process Clause,'

. . . it is fundamental that . . . due process requires that when a State seeks to terminate an interest such as that involved here, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (quoting *Mullane*, 339 U.S. at 313). Where a case "has been decided against [a litigant] without his even having had the proper opportunity to present his evidence," he is "deprived of due process of law contrary to the Fourteenth Amendment." *Saunders v. Shaw*, 244 U.S. 317, 319 (1917) (Holmes, J.).

As demonstrated at greater length in the petition for *certiorari*, *Morton* ignores or contravenes these fundamental rights in numerous ways:

- It invoked *sua sponte* a legal theory (*i.e.*, equitable estoppel) neither alleged nor pursued by the respondent at any stage. Pet. at 1, 5.
- It based its estoppel holding on a New Jersey decision neither cited nor argued by Morton nor any of its *amici*. Pet. at 8; *see* Ptr. App. 88a-89a (relying on *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969)).
- It imposed an estoppel even though there was no opportunity to develop an evidentiary record on any of the factual elements of estoppel under New Jersey law. Pet. at 23-29. There was no discovery as to those elements; neither the trial court nor the intermediate appellate court made any findings or reached conclusions on those elements. Pet. at 5, 24-29.
- The court made *de novo* factual determinations based on case reports, partisan articles in journals, and other non-evidentiary material, in the absence of any evidentiary record on issues of estoppel. Pet. at 2, 8.
- It also perused case reports instead of creating an adequate evidentiary record. None of these decisions relied upon by the court was: (1) decided

in terms of equitable estoppel or the New Jersey regulatory process; (2) based upon an evidentiary hearing on the so-called "regulatory history" of the pollution exclusion; or (3) entitled to treatment as res judicata. Pet. at 18.

- Relying on non-evidentiary materials, it asserted that a remand to develop an evidentary record on issues of fact that were, in actuality, highly disputed would be "redundant." Pet. at 1-2, 9 & n.10, 14.[22]

The Court should grant the petition to signal disapproval of the constitutionally flawed *Morton* procedures.[23]

2. *The* Morton *Court's Refusal to Consider the Individual Circumstances of Various Insurers Confirms that the Court Was Acting Illegitimately.*

While the evidence, if fairly examined, would show that *no* insurer should be estopped on the basis of the challenged communications to the state regulators, *Morton* did not even adhere to its own faulty "rationale"—that insurers that allegedly misled state regulators about the meaning of the pollution exclusion in 1970 should be punished by being deprived of the exclusion's protection. *Morton* should logically not affect insurers who had nothing to do with the 1970 presentation. Yet, it simply disregarded that some insurers entered the New Jersey mar-

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[22] Also, the *Morton* court impermissibly "probe[d] the mental process of" state insurance regulators, many years after the fact, in contravention of this Court's rule in *United States v. Morgan*, 313 U.S. 409, 422 (1941); *see New Jersey Turnpike v. Sisselman*, 255 A.2d 810, 815 (N.J. Super. Ct. App. Div.), *certif. denied*, 258 A.2d 16 (N.J. 1969) (adopting *Morgan* rule).

[23] The Attorney General of New Jersey recently contended that only this Court could ameliorate any constitutional deficiencies that may invalidate the *Morton* decision. *See* Brief of *Amicus Curiae* State of New Jersey, Dep't of Environmental Protection and Energy at 12-13, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, Nos. 93-5777, 93-5794 (dated June 2, 1994). Copies of this Brief have been lodged with the Court for its convenience.

ket after the pollution exclusion had been approved by New Jersey regulators. Other insurers never joined the Insurance Rating Board ("IRB"), which made the communications at issue. *Morton*'s failure to consider the circumstances of individual litigants demonstrates its departure from the requisites of due process.

The so-called "London Market Insurers" (Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies), which had nothing to do with the submission of the 1970 pollution exclusion to state regulators, asked the *Morton* court to clarify, on reconsideration, that its opinion did not apply to them.[24] The *Morton* court refused. Ptr. App. 198a-201a; *see* Brief of Respondents in Support of Petition for a Writ of *Certiorari* 1-2 ("At an elementary level, . . . in order for a claim of estoppel to be made against a party, that party must have had some communication with the regulators on the matter for which estoppel is sought."). Accordingly, review of the case is necessary to reaffirm the principle that the individual circumstances affecting each party are to be fairly considered in reasoned adjudication.

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[24] Motion for Partial Reconsideration and Clarification at 12-13, 14-15 (Aug. 30, 1993). Specifically, the London Market Insurers argued that it would be "fundamentally unfair" to apply any estoppel against them given that (a) they had never been members of the IRB (which had made the allegedly "deceptive" representations in the early 1970s); (b) they had never been members of any of the IRB's successors; (c) their policies rarely contained the "sudden and accidental" language; and (d) their policies at issue in *Morton* did not contain that language. In fact, *all* of the London Market policies in issue had expired before 1970—*i.e.*, before the pollution exclusion had even been proposed to the states. Copies of this Motion have been lodged with the Court for its convenience.

B. The Due Process Clause Forbids Procedurally Deficient Judicial Actions Whose Effect Is To Rewrite Contracts Or Expropriate Valuable Property Rights.

The Constitution establishes procedural protection for private contract rights by ensuring that they can be compromised in only two fundamental ways. A court can alter such rights equitably, so long as it complies with the requisites of due process (and, where appropriate, the Takings Clause); or, in certain circumstances, the state legislature may modify such rights, within the limits of the Due Process, Takings, and Contracts Clauses. As to legislation, property owners can repair to the democratic process to protect their property.

Morton is rooted in a legislative-like policy determination to vitiate vital provisions of all the insurance agreements at issue, unjustifiably shifting insurer assets to policyholders.[25] Stripped of their rights to notice and a hearing, insurers face the uncompensated deprivation of their property without either due process or the opportunity to participate in the democratic process. This plainly unconstitutional result necessitates examination by this Court.

The Court has repeatedly recognized that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2115 (1991). *See also TXO Prods. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (Constitution forbids "taking of . . . property without due process"). Because "[v]alid contracts are property," *Lynch*, 292 U.S. at 579 (Brandeis, J.), they may not be abrogated without due process. Where a contractual relation has arisen, "the right to enforce it, hav-

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[25] *Cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (overturning New Jersey Supreme Court decision upholding state legislation banning the importation of solid waste on the grounds that this Court "has consistently found parochial legislation of this kind to be constitutionally invalid.").

ing become vested, comes within the protection of . . . the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Coombes v. Getz*, 285 U.S. 434, 448 (1932).

State courts thus cannot "deprive [an entity] of property without affording it at any time an opportunity to be heard in its defense." *Brinkerhoff-Faris Co.*, 281 U.S. at 678 (Brandeis, J.). A state court cannot deprive an owner of property rights where it "has denied . . . due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* Such a deprivation is grave, because "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened." *Lynch*, 292 U.S. at 580.

The petitioners' rights under the pollution exclusion in their contracts are valuable (if intangible) assets.[26] The pollution exclusion blocks coverage for massive unfunded liabilities. IELA members have issued thousands of insurance policies containing this or similar clauses in New Jersey and throughout the nation, and are defending more than one hundred cases nationwide under those clauses. The pollution exclusion is therefore an asset with enormous real worth, and *Morton* unquestionably affects its value in every pending case.

Here, the New Jersey court affirmed that, under the insurance policies' plain language, the insurers had the vested contractual rights that they claimed. Ptr. App. 33a-34a. "When a right has arisen upon a contract . . . and has been so far perfected that nothing remains to be done by the party asserting it, . . . [i]t has become a vested right which stands independent[ly]." *Coombes*, 285

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[26] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (property rights are based on "an individual entitlement grounded in state law" and include "varied and, as often as not, intangible" interests).

U.S. at 445. Yet, through *Morton*, New Jersey deprived *all* insurers of the right to enforce this vital part of their contracts without affording them basic procedural protections.

Morton is an unjustifiable deprivation of vested property rights by means of lawmaking that is at its core legislative, not judicial. *Ettor v. City of Tacoma*, 228 U.S. 148, 155 (1913). Had *Morton*'s seizure of property been accomplished by the New Jersey legislature,

> the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary. . . . The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

Brinkerhoff-Faris Co., 281 U.S. at 679-80 (Brandeis, J.) (citations omitted).

Morton's contention that the pollution exclusion is unenforceable, because of alleged misrepresentations when it was introduced, does not evade the requirement that insurers be accorded due process before their property is taken. Insurers and insureds have relied on the provision in negotiating premiums ever since its approval by New Jersey regulators. The Constitution "prohibits (or requires compensation for) all retroactive laws that destroy vested rights." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring). "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). *Morton*'s invalidation, decades after the fact and without key procedural safeguards, of an insurer's right to enforce the contract's recognized meaning calls upon this Court to grant the insurers' petition. *See Lynch*, 292 U.S. at 576.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for *certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby reply to the opposition filed by respondent Morton International, Inc. ("Morton").[1] In the main, Morton does not dispute petitioners' showings that this case is of great importance to industries depending on regulatory approvals, including the insurance industry, and that other courts throughout the country are being urged to follow New Jersey. Instead, Morton seeks to avoid a grant of certiorari by arguing that petitioners received due process below. This assertion has no basis in fact. Equitable estoppel was not at issue at the trial level, was never raised at the intermediate appellate level, and was absent from the briefs and arguments presented before the New Jersey supreme court. Indeed, equitable-estoppel issues were interjected into the case *sua sponte* by the supreme court only after any opportunity for the insurers to present evidence addressing those issues had passed. Due process requires that, after the supreme court belatedly interjected the equitable-estoppel theory into the case, petitioners have an opportunity to show that the facts do not support an equitable estoppel.

I. CONTRARY TO MORTON'S ASSERTIONS, THE DECISION BELOW WAS PREDICATED UPON THE TRADITIONAL DOCTRINE OF EQUITABLE ESTOPPEL.

Morton's effort to defend the process in this case depends in large part on a false characterization of the holding below. According to Morton, the decision below did not turn on the "various elements" of the traditional doc-

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[1] As used herein, "Pet." refers to the petition, and "Pet. App." to the accompanying appendix (dated May 11, 1994). "Opp." refers to Morton's opposition, and "Opp. App." to Morton's appendix (dated June 10, 1994). "London Br." refers to the brief of Underwriters at Lloyd's, London, Certain Subscribing London Market Insurance Companies, and Affiliated FM Insurance Company (dated May 27, 1994); and "IELA Br." refers to the *amicus* brief filed by *amicus*-movant Insurance Environmental Litigation Association (dated June 13, 1994).

trine of " 'equitable' estoppel"—misrepresentation, reasonable reliance, and detriment. (Opp. 9.) Rather, says Morton, the decision below is "predicated upon" a novel "concept of 'regulatory' estoppel," a concept which supposedly focuses exclusively on the "representations" made to state insurance regulators in 1970-71. (*Id.*) This position cannot be squared with the decision below.

The New Jersey supreme court expressly predicated its decision upon the traditional doctrine of equitable estoppel, as previously enunciated in *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969). (*See* Pet. App. 88a-90a; Pet. 8-9.) *Harr* set forth, and the decision below adopted, the three well-established elements of an equitable estoppel—misrepresentation, reasonable reliance, and detriment. (*See* Pet. App. 89a-90a; Pet. 8-9.) The court below stated expressly that it was extending *Harr* into the regulatory context, not that it was announcing a novel "regulatory estoppel" theory that eliminated the traditional prerequisites for imposition of an equitable estoppel. (Pet. App. 90a.) The supreme court then proceeded explicitly to make *de novo* factual determinations, summarily and on the basis of non-evidential materials, concerning those prerequisites. (*See* Pet. 8-9, 24-29.)

The intensely factual nature of the equitable-estoppel theory on which the supreme court relied is central to petitioners' due process claim.[2] By rejecting the ambiguity arguments of Morton and its *amici* (and the *Broadwell* case on which they relied) but nonetheless adopting *sua sponte* an equitable-estoppel theory, the Supreme Court of New Jersey made its decision turn on three *factual inquiries* necessarily going beyond the face of the 1970-71 representations made to the state regulators by the IRB/

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[2] This is not to say that petitioners ask this Court to resolve the underlying factual disputes. The question before this Court is whether the court below denied petitioners due process by denying notice and an opportunity to be heard concerning the dispositive factual issues.

MIRB—(1) whether those representations constituted misrepresentations in view of the real-world circumstances then existing, (2) whether New Jersey's expert regulators were somehow misled concerning the "plain meaning" of the proposed clause by reliance on any IRB/MIRB misrepresentations, and (3) whether the absence of an exclusion-triggered rate reduction constituted the detriment requisite to imposition of an equitable estoppel. (*See* Pet. 8-9, 23-29.) Petitioners' showing concerning the fundamentally unfair nature of the process by which the supreme court summarily resolved those factual questions, all of which are sharply disputed, stands wholly unrebutted.

To illustrate, the supreme court considered the alleged detriment of the absence of an exclusion-triggered rate decrease to be so important to its holding that the opinion returns to that topic at least four separate times. (*See* Pet. App. 35a-36a, 42a-46a, 87a-90a, 94a-95a.) Morton does not even attempt to show any basis whatever for the supreme court's *de novo* determination that a rate reduction would have been "inescapable" had 1970 regulators understood the pollution-exclusion clause. (Pet. App. 86a-87a; *see* Pet. 28-29.) By falsely denying that this issue was relevant to the decision below, Morton tacitly concedes its complete inability to defend the process by which the issue was resolved.[3]

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[3] Likewise, Morton shows no basis for the supreme court's *de novo* conclusion that New Jersey's expert regulators (or those of any other state) failed to understand the "plain meaning" of the pollution-exclusion clause in 1970 due to the single supposedly misleading paragraph in the IRB/MIRB Explanatory Memorandum. (Pet. App. 86a-87a; *see* Pet. 26-27.) Instead, Morton asserts that principles of New Jersey administrative law preclude inquiry into the mental processes of the New Jersey regulators. (*See* Opp. 16-17.) Notably, the supreme court did not invoke such principles in refusing a remand on equitable-estoppel issues, nor can Morton invoke them consistent with the supreme court's approach to the case. (*See* Pet. App. 35a.) Here, more than 20 years after the pollution-exclusion clause was approved by the New Jersey De-

II. CONTRARY TO MORTON'S ASSERTIONS, PETITIONERS HAD NO OCCASION OR OPPORTUNITY TO MARSHAL THEIR DEFENSES AGAINST POTENTIAL IMPOSITION OF AN EQUITABLE ESTOPPEL.

According to Morton, petitioners had adequate notice and opportunity to defend themselves because "the New Jersey Supreme Court did not invoke the theory of estoppel '*sua sponte*.' " (Opp. 3.) If this were true (which it is not), Morton would be able to cite specifically to the record to show (1) where Morton or its *amici* proposed that petitioners be equitably estopped from enforcing the pollution-exclusion clause as written, (2) where Morton or its *amici* purported to address the factual prerequisites to imposition of an equitable estoppel, and (3) where petitioners had a fair opportunity to introduce their own proof on those points or to test adverse proof. Morton's vague and tortured discussion of the record below does not even purport to make any of these showings.

First, by falsely characterizing the nature of the holding below (*see* Part I *supra*), the opposition effectively concedes that Morton and its supporting *amici* never urged the theory of equitable estoppel (or the *Harr* case) and never sought to prove the factual prerequisites of an equitable estoppel. Unable to show that there was meaningful notice or opportunity to defend against the equitable-estoppel theory that was ultimately dispositive, Morton has instead scoured the record for any and all appearances of the multi-faceted word "estoppel." (*See* Opp. 3-6, 12-14.)

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partment of Insurance, the supreme court *sua sponte* invalidated the regulatory approval on the basis that state regulators were "misled" in 1970 and "would not readily have understood" the clause. (Pet. App. 35a, 90a.) In other words, the court itself brought into the case issues concerning the mental processes of state regulators, made summary inferences without any evidential basis whatever concerning those mental processes, and simultaneously denied petitioners an opportunity to rebut those inferences.

By Morton's own account, in the entire course of the supreme court briefing, the word "estoppel" cropped up only twice (once in a footnote discussing the West Virginia decision in *Joy Technologies*).[4] In neither instance, however, was the word used in a context remotely suggestive that petitioners were somehow on notice of the possible imposition of an equitable estoppel, and nowhere did Morton or its *amici* purport to demonstrate satisfaction of the doctrine's factual prerequisites—misrepresentation, reasonable reliance, and detriment. If Morton and its *amici* had indeed made equitable-estoppel arguments in this high-profile case (*see* Opp. 2), the briefing on both sides obviously would have been suffused with discussion of equitable-estoppel principles, the *Harr* case, and the prerequisites of misrepresentation, reasonable reliance, and detriment. There was no such briefing because the supreme court's equitable-estoppel ruling came as a bolt out of the blue.[5]

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[4] *See* Opp. 4, 6; Opp. App. 58a-59a, 64a. Morton's opposition relies heavily and misleadingly on the decision of the Supreme Court of West Virginia in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992). Contrary to Morton's assertions (and the inaccurate brief of one of Morton's *amici*), the *Joy* court did not purport to rest its decision on estoppel doctrine of any stripe. (*Compare* Pet. 17 n.19 *with* Opp. 3-4, 6, 13 & Opp. App. 58a n.37.) More important, *Joy* clearly did *not* purport to apply equitable-estoppel principles and thus made no findings on the questions of misrepresentation, reasonable reliance, and detriment. Thus, neither the *Joy* decision, nor citation to it by Morton's *amici*, served to give petitioners indirect notice that the Supreme Court of New Jersey might *sua sponte* invoke equitable-estoppel principles. Furthermore, contrary to Morton's implications (Opp. 4), Aetna Casualty & Surety Company ("Aetna") first sought leave to file an *amicus* brief well in advance of the June 11, 1992 decision in *Joy*. (*See* Opp. App. 6a.) Indeed, Aetna's motion was granted on May 26, 1992. (Opp. App. 8a.)

[5] Morton's arguments concerning notice (Opp. 3-4, 6-7, 12-14) turn on four submissions to the supreme court: (1) Amended Brief of *Amicus Curiae* New Jersey State League of Municipalities (dated June 24, 1992), (2) Brief *Amici Curiae* of Allied-Signal, Inc., et al. (dated June 19, 1992), (3) Reply Brief of Defendant-Respondents/Cross-Appellants

The gossamer thinness of Morton's assertions concerning notice and opportunity to defend thus serves only to underscore the petitioners' showing that the supreme court invoked the concept of equitable estoppel *sua sponte* in its final decision. In the end, Morton's position is that petitioners were legitimately at risk of any possible adverse outcome on the pollution-exclusion clause, on any theory and on the basis of the supreme court's *de novo* perusal of whatever materials happened to be at hand, simply because petitioners knew that the pollution-exclusion clause was the subject of (unavailing) ambiguity arguments in the case. But the Due Process Clause requires meaningful notice and opportunity to defend, including the opportunity to contradict adverse allegations or evidence. That requirement is not met when factual issues that ultimately prove dispositive are never framed with specificity and litigants therefore have no basis on which to marshal an adequate evidentiary record. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 120-21 (1991) (due process requires "adequate notice of the critical issue that the [court] was actually debating" as the "bedrock of any constitutionally fair procedure").

It is true, as Morton argues, that the appellate record below was voluminous and that *amici* supporting each side submitted extensive materials concerning the regulatory history at the supreme court level. These materials included a submission by Aetna responding solely to the ambiguity arguments advanced by Morton. (*See* Opp. App. 41a-42a.) As shown in the petition, however, petitioners repeatedly stressed that such materials were *not* a substitute for a full and fair opportunity to create an evi-

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Insurance Company of North America, et al. (dated June 29, 1992), and (4) Brief of *Amicus Curiae* State of New Jersey (dated Oct. 28, 1992). Petitioners therefore have lodged twelve copies of each of these briefs with the Clerk's Office. Review of the briefs will fully confirm that neither Morton nor its supporting *amici* urged imposition of an equitable estoppel on the New Jersey supreme court.

dentiary record. (*See* Pet. 7 & n.8; *see also* Opp. App. 70a-72a, 79a-80a.) More important, Aetna's materials were not directed to the separate issue of equitable estoppel, which neither petitioners nor Aetna knew to be in the case. (*See* note 4 *supra*.) Thus, petitioners' evidence on these issues was not before the supreme court through Aetna's submission, or otherwise.

Morton also argues that the formal opportunity to seek reconsideration was part of the due process supposedly afforded to petitioners. (Opp. 21.) The speciousness of this argument is shown by the fact that the supreme court denied reconsideration without comment even after being presented with 44 affidavits of 1970-era regulators showing beyond dispute that critical facts resolved by the court's summary inferences were sharply disputed and hence that there was no basis for summary resolution of the equitable-estoppel issues by *de novo* appellate fact-finding. Moreover, this Court has held that due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, a violation of due process can only be remedied by "wiping the slate clean" and thereby restoring litigants "to the position [they] would have occupied had due process of law been accorded to [them] in the first place." *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 87 (1988); *see Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917). That requirement is not met by the mere existence of a formal opportunity to apply for discretionary rehearing to a court which gives no indication whatever that it has taken any steps to repair the due process violation.

III. CONTRARY TO MORTON'S ASSERTIONS, THIS IS THE PROPER CASE IN WHICH TO REVIEW THE DUE PROCESS SUFFICIENCY OF THE PROCEDURES BELOW.

Morton concedes this Court's appellate jurisdiction, but asserts that it has been "this Court's practice to decline

review of a case when the party appealing was successful below." (Opp. 10.) However, Morton does not deny that, unless overturned, the decision below will have a significant adverse impact on petitioners and the insurance industry generally. The petition has already shown the basis for this Court's exercising appellate jurisdiction even though petitioners achieved a victory with respect to Morton's specific claims concerning Berry's Creek. (*See* Pet. 10 & n.12.)

Although Morton did not benefit in this particular case, the decision below made equitable-estoppel rulings which Morton can invoke in other cases and which are already being followed by other courts applying New Jersey law. (*See* Pet. 9-10; London Br. 1-4; IELA Br. 4-11.) Moreover, as noted by amicus-movant Insurance Environmental Litigation Association, the Attorney General of New Jersey has recently argued in the *Chemical Leaman* case in the Third Circuit that any due process violation in the *Morton* decision can *only* be corrected by writ of certiorari in this case. (*See* IELA Br. 14 n.23.) Thus, if review is denied here because petitioners prevailed over Morton with respect to Berry's Creek, it is entirely predictable that subsequent litigants (possibly Morton itself) will argue that the due process sufficiency of *Morton* was laid to rest in this case. Plainly, this is the most timely and sharply focused opportunity this Court will have to review the sufficiency of the unfair process by which this devastating decision was reached. Consistent with this Court's tradition of "zeal[] to protect" due process rights in "all types of cases," the due process issues should be reached now. *Greene v. McElroy*, 360 U.S. 474, 497 (1959).[6]

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[6] Morton notes the pendency of a legislative proposal to reform the "Superfund" program. (Opp. 22 n.7.) This observation is not pertinent for many reasons, starting with the fact that the questions presented concern petitioners' due process rights, not issues of environmental or insurance law. Moreover, the proposed legislation would have no impact

CONCLUSION

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Dated: June 16, 1994

Respectfully submitted,

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on the large numbers of non-Superfund cases (such as this one) in which policyholders have invoked or will invoke the decision below. Further, while the proposed legislation would provide for the voluntary resolution of some insurance-coverage disputes relating to federal Superfund sites, policyholders would still have the option to continue to litigate. Indeed, they will be more likely to litigate if they can count on decisions like that below which (without due process) deny insurers their contractual defenses. Thus, the New Jersey decision actually undermines the potential efficacy of the legislation, which itself has uncertain prospects for passage.

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